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WASHINGTON REPORTS

VOL. 61

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

DECEMBER 2, 1910—JANUARY 28, 1911

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JUDGES

OF THE

SUPREME COURT OF WASHINGTON

DURING THE PERIOD COVERED IN THIS VOLUME

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TABLE

OF

CASES REPORTED

	Page
Abraham, State ex rel. Bussell v.	601
Aetna Indemnity Company, Gerber v.	184
Ahrens, Mosby v.	695
Allen v. Chehalis Lumber Company	159
American Savings Bank & Trust Company, Barkley v.	415
Anders v. Bouska	393
Anderson, Johnson v.	100
Anderson, State v.	674
Anderson v. Woolley	236
Aumiller, North Coast Railroad Company v.	271
Austin v. Everett	493
Baker v. Seattle-Tacoma Power Company	578
Barkley v. American Savings Bank & Trust Company	415
Barnum v. Seattle, Renton & Southern Railway Company	157
Beebe v. Northwestern Dairy Company	294
Beltinck v. Tacoma Theater Company	132
Berger v. Metropolitan Press Printing Company	35
Birrell v. Great Northern Railway Company	336
Black Masonry & Contracting Company v. National Surety Company	471
Bluher v. Earles	84
Board of County Commissioners of King County, State ex rel. Burke v.	684
Bonanza Queen Mining Company, Hawley v.	90
Book v. Thomas	607
Bouska, Anders v.	393
Boutelle, Tacoma v.	434

	Page
Bradford-Kennedy Lumber Company, Burns v.	276
Bremer, Morin v.	62
Brown, Fidalgo Island Shingle Company v.	516
Brown, Sexsmith v.	164
Brown v. Thorne	18
Budman v. Seattle Electric Company	281
Burke, Cameron v.	203
Burns v. Bradford-Kennedy Lumber Company	276
Cameron v. Burke	203
Campbell v. Glazier	520
Cavelin v. Stone & Webster Engineering Corporation.	375
Center, Coler v.	694
Chehalis Lumber Company, Allen v.	159
Chicago Milwaukee & Puget Sound Railway Company, Gibson v.	639
Christensen v. Hawley	14
Clemens v. Stanton Company	419
Coffer v. Erickson	559
Coffman, Spokane Canal Company v.	357
Cole v. Hunter Tract Improvement Company	365
Coler v. Center	694
Continental Casualty Company, Lewis v.	154
Cook v. Danaher Lumber Company	118
Cox v. Wilkeson Coal & Coke Company	343
Craddick, State v.	425
Craig, Smith v.	528
Crowder v. Morphy	626
Dahlstrom v. Inland Box and Manufacturing Company.	325
Dalgardno v. Trumbull	659
Danaher Lumber Company, Cook v.	118
Davison, Watkins v.	662
Delaski v. Northwestern Improvement Company	255
Dempsey v. Dempsey	632
Densmore v. Evergreen Camp No. 147, Woodmen of the World	230
Donovan, State v.	209

Page

Dukette v. Northwestern Woodenware Company..... 95
Dungan, Green v..... 65
Dykeman, Renton v..... 330

Earles, Bluher v..... 84
Eastman, Ingalls v..... 289
Elliott Bay Mill & Lumber Company, Gronning v..... 676
Erickson, Coffer v..... 559
Everett, Austin v..... 493
Everett, In re..... 493
Everett v. Paschall..... 47
Evergreen Camp No. 147 Woodmen of the World, Densmore v..... 230

Feighan v. Reeves..... 465
Fidalgo Island Shingle Company v. Brown..... 516
Flanney, State v..... 482
Flint, Hughes & Company v..... 460

Garrett v. Sparks Brothers..... 397
Gerber v. Aetna Indemnity Company..... 184
Gibson v. Chicago, Milwaukee & Puget Sound Railway Company..... 639
Gilbert, Spokane v..... 361
Ginnett, Hesselgrave v..... 87
Gladden v. Jacobowski..... 242
Glazier, Campbell v..... 520
Graff v. Tacoma..... 186
Gray, State v..... 549
Great Northern Railway Company, Birrell v..... 336
Green v. Dungan..... 65
Greenshields, Petticrew v..... 614
Gronning v. Elliott Bay Mill & Lumber Company..... 676

Haggard v. Seattle..... 499
Hall v. Northwest Lumber Company..... 351
Hamilton, Maughlin Mill Company v..... 66
Hamshaw, State v..... 390
Hannenen, Shryock v..... 296

Page

Hardman Estate v. McNair..... 74
Hawley v. Bonanza Queen Mining Company..... 90
Hawley, Christensen v..... 14
Hayes v. Vancouver..... 536
Heckert v. Hilscher..... 269
Hedican, Pacific Coast Pipe Company v..... 576
Hesselgrave v. Ginnett..... 87
Hibbard, Merritt v..... 368
Hill, Lewis v..... 304
Hilscher, Heckert v..... 269
Holden v. Romano..... 458
Holt Manufacturing Company v. Odenrider..... 555
Horton v. Seattle..... 301
Hughes & Company v. Flint..... 460
Hunter Tract Improvement Company, Cole v..... 365
Hyde v. Phillips..... 314

Ingalls v. Eastman..... 289
Inland Box and Manufacturing Company, Dahlstrom v.. 325
In re Everett..... 493
In re Littlefield..... 150
In re Renton..... 330
In re South Shilshole Place..... 246

Jacob, Mayer v..... 291
Jacobowski, Gladden v..... 242
Jaggy v. Rooney..... 381
Jahns, State v..... 636
Johnson v. Anderson..... 100
Jones v. Kehoe..... 422
Jones v. Leslie..... 107
Jones v. Nelson..... 167
Jordan v. Welch..... 569

Kehoe, Jones v..... 422

Lasityr v. Olympia..... 651
Laws, State v..... 533
Lepper v. Stetson & Post Lumber Company..... 523

Page
Leroy, State v. 405
Leslie, Jones v. 107
Letica, State v. 629
Levy v. Seattle. 540
Lewis v. Continental Casualty Company. 154
Lewis v. Hill. 304
Lincoln County State Bank, Pickle v. 545
Lindsey, Margetts v. 321
Littlefield, In re. 150
London Assurance Corporation, Silver v. 593
Lyon v. Sparks. 348

McAdam v. Russell. 176
McDonald v. Seattle. 696
McDowell, State v. 398
McGilvra v. Seattle Electric Company. 38
McMurchie, Walker v. 489
McNair, Hardman Estate v. 74
McPherson Brothers Company v. Okanogan County. . . . 239
Manvell v. Weaver. 23
Maple Valley Lumber Company, Schoening v. 332
Margetts v. Lindsey. 321
Maughlin Mill Company v. Hamilton. 66
Mayer v. Jacob. 291
Merrill v. Stevens & Company. 28
Merritt v. Hibbard. 368
Metropolitan Press Printing Company, Berger v. 35
Miller, State v. 125
Mitchell, Russell v. 178
Morin v. Bremer. 62
Morphy, Crowder v. 626
Mosby v. Ahrens. 695
Mrozevich v. Western Steel Corporation. 668
Murkowski v. Murkowski. 103

Nappli v. Seattle, Renton & Southern Railway Company. 171
National Bank of Commerce of Seattle v. Puget Sound
Biscuit Company. 192

Page

National Surety Company, Black Masonry & Contracting Company v. 471
Nelson, Jones v. 167
Nelson v. Western Steel Corporation. 672
Nicolls, State v. 142
North Coast Railroad Company v. Aumiller. 271
Northern Pacific Railway Company, Pierson v. 450
Northern Pacific Railway Company v. Slade Lumber Company 195
Northwestern Dairy Company, Beebe v. 294
Northwestern Improvement Company, Delaski v. 255
Northwestern Woodenware Company, Dukette v. 95
Northwest Lumber Company, Hall v. 351

Odenrider, Holt Manufacturing Company v. 555
Okanogan County, McPherson Brothers Company v. . . 239
Olympia, Lasityr v. 651

Pacific Coast Pipe Company v. Hedican. 576
Paschall, Everett v. 47
Peterson v. St. Francis Hotel Company. 378
Petticrew v. Greenshields. 614
Phillips, Hyde v. 314
Pickle v. Lincoln County State Bank. 545
Pierce County, Wilton v. 386
Pierson v. Northern Pacific Railway Company. 450
Pilegge, State v. 264
Props v. Washington Pulley and Manufacturing Company 8
Puget Sound Biscuit Company, National Bank of Commerce of Seattle v. 192

Ratliff, White v. 383
Reeves, Feighan v. 465
Renton v. Dykeman. 330
Renton, In re. 330
Risaburo, State v. 162
Romano, Holden v. 458

Page
Robinson v. Seattle 246
Rooney, Jaggy v 381
Russell, McAdam v 176
Russell v. Mitchell 178

St. Francis Hotel Company, Peterson v 378
Savage v. Tacoma 1
Schoening v. Maple Valley Lumber Company 332
Seattle, Haggard v 499
Seattle, Horton v 301
Seattle, Levy v 540
Seattle, McDonald v 696
Seattle, Robinson v 246
Seattle Baseball Association, State ex rel. Rowland v .. 79
Seattle Electric Company, Budman v 281
Seattle Electric Company, McGilvra v 38
Seattle Electric Company, Smith v 175
Seattle Renton & Southern Railway Company, Barnum v. 157
Seattle Renton & Southern Railway Company, Nappli v. 171
Seattle-Tacoma Power Company, Baker v 578
Sexsmith v. Brown 164
Shaw, West v 227
Shaw v. Woodland Shingle Company 56
Shryock v. Hannenen 296
Silver v. London Assurance Corporation 593
Simons v. Wilson 574
Slade Lumber Company, Northern Pacific Railway Company v. 195
Sloane Company, Stetson & Post Lumber Company v ... 180
Smith v. Craig 528
Smith v. Seattle Electric Company 175
South Shilshole Place, In re 246
Sparks, Lyon v 348
Sparks Brothers, Garrett v 397
Spokane v. Gilbert 361
Spokane Canal Company v. Coffman 357
Stanton Company, Clemens v 419

Page
Starck v. Washington Union Coal Company..... 213
State v. Anderson 674
State v. Craddick..... 425
State v. Donovan 209
State v. Flanney 482
State v. Gray 549
State v. Hamshaw 390
State v. Jahns 636
State v. Laws 533
State v. Leroy 405
State v. Letica 629
State v. McDowell 398
State v. Miller 125
State v. Nicolls 142
State v. Pilegge 264
State v. Risaburo 162
State ex rel. Brunn v. State Board of Medical Examiners 623
State ex rel. Burke v. Board of County Commissioners of King County 684
State ex rel. Bussell v. Abraham..... 601
State ex rel. Rowland v. Seattle Baseball Association... 79
State ex rel. Schwabacher Brothers & Company v. Superior Court, King County..... 681
State ex rel. Tacoma v. Tacoma Railway and Power Company 507
State Board of Medical Examiners, State ex rel. Brunn v. 623
Stetson & Post Lumber Company, Lepper v..... 523
Stetson & Post Lumber Company v. Sloane Company... 180
Stevens & Company, Merrill v..... 28
Stone & Webster Engineering Corporation, Cavelin v... 375
Sumner Iron Works v. Wolten..... 689
Superior Court, State ex rel. Schwabacher Brothers & Company v. 681

Tacoma v. Boutelle..... 434
Tacoma, Graff v..... 186
Tacoma, Savage v..... 1

Page

Tacoma Railway and Power Company, State ex rel. Tacoma v. 507
Tacoma Theater Company, Beltinck v..... 132
Talkington v. Washington Veneer Company..... 137
Thomas, Book v..... 607
Thompson-Spencer Company v. Thompson..... 547
Thompson, Thompson-Spencer Company v..... 547
Thorne, Brown v..... 18
Trumbull, Dalgardno v..... 659

Vancouver, Hayes v..... 536
Van Gelder v. Van Gelder..... 146

Walker v. McMurchie..... 489
Washington Pulley and Manufacturing Company, Props v. 8
Washington Union Coal Company, Starck v..... 213
Washington Veneer Company, Talkington v..... 137
Watkins v. Davison..... 662
Weaver, Manvell v..... 23
Welch, Jordan v..... 569
West v. Shaw..... 227
Western Steel Corporation, Mrozevich v..... 668
Western Steel Corporation, Nelson v..... 672
White v. Ratliff..... 383
Wilkeson Coal & Coke Company, Cox v..... 343
Wilson, Simons v..... 574
Wilton v. Pierce County..... 386
Wolten, Sumner Iron Works v..... 689
Woodland Shingle Company, Shaw v..... 56
Woolley, Anderson v..... 236

TABLE

OF

CASES CITED BY THE COURT

				Page
Aerkfetz v. Humphreys	145	U. S.	418	342
Allen v. Boston	159	Mass.	324	540
Allen v. Flood	67	L. J. Q. B.	119	112
Allen v. Tacoma Mill Co	18	Wash.	216	678
Ambrose v. Moore	46	Wash.	463	417
Amy v. Dubuque	98	U. S.	470	628
Anderson v. Burgoyne	60	Wash.	511	385
Anderson v. Caldwell	91	Ind.	451	402
Anderson v. Globe Nav. Co	57	Wash.	502	354
Anderson v. Pacific Nat. Lum. Co	60	Wash.	415	527
Anderson v. Wallace Lum. & Mfg. Co.	30	Wash.	147	194
Anonymous	3	Atk.	750	53
Anson v. Northern Pac. R. Co	45	Wash.	92	342
Ardmore Nat. Bank v. Briggs Mach. etc. Co.	20	Okl.	427	692
Arnold v. Cambridge	106	Mass.	352	249, 250
Arthur v. Texas & Pac. R. Co	139	Fed.	127	456
Ashley v. Port Huron	35	Mich.	295	539
Atchinson etc. R. Co. v. Cochran	43	Kan.	225	513
Atchison & N. R. Co. v. Bailey	11	Neb.	332	649
Atchison etc. R. Co. v. Cameron	66	Fed.	706	44
Athens Mut. Ins. Co. v. Toney	1	Ga. App.	492	598, 599
Augusta R. & Elec. Co. v. Arthur	3	Ga. App.	513	656
Austrian v. Dean	23	Minn.	62	319
Averbuch v. Great Northern R. Co.	55	Wash.	633	341
Avis v. Vineland	55	N. J. L.	285	6
Babcock v. Chicago & N. W. R. Co.	62	Iowa	593	649
Baker v. Duwamish Mill Co	43	Wash.	149	13
Baker v. Tacoma Eastern R. Co	44	Wash.	575	342
Balam v. Rouleau	52	Wash.	389	105
Ball v. Clothier	34	Wash.	299	661
Baltimore v. Fairfield Imp. Co	87	Md.	352	54, 233
Bank of London v. Tyrrell	5	Jur. N. S.	924	590
Bank of Shelton v. Willey	7	Wash.	535	257
Barclay v. Puget Sound Lum. Co	48	Wash.	241	60

				Page
Barnes v. Hathorn	54	Me.	124	52, 233
Baron v. New York City R. Co.	105	N. Y. Supp.	258	44
Beebe v. Redward	35	Wash.	615	475
Beer Co. v. Massachusetts	97	U. S.	25	445
Belleville Stone Co. v. Comben	61	N. J. L.	353	60
Belloni v. Freeborn	63	N. Y.	383	480
Beltinck v. Tacoma Theater Co.	61	Wash.	132	492
Benjamin v. Wheeler	8	Gray	409	111
Benner v. Wallace Lum. & Mfg. Co.	55	Wash.	679	527
Berg v. United States Leather Co.	125	Wis.	262	60
Berger v. Metropolitan etc. Co.	55	Wash.	422	35
Bethea v. Northwestern R. Co.	26	S. C.	91	456
Black v. Wabash etc. R. Co.	111	Ill.	351	455
Blanshard v. Schwartz	7	Okl.	23	182
Blanton v. State	1	Wash.	265	403
Blodgett v. Utley	4	Neb.	25	628
Board of Harbor Line Com'rs v. State ex rel. Yesler	2	Wash.	530	198
Bodie v. Charleston etc. R. Co.	61	S. C.	468	504
Bolling v. State	54	Ark.	588	486
Bollington v. Louisville & N. R. Co.	30	Ky. Law	1260	10, 12
Book v. West	29	Wash.	70	611
Born v. Home Ins. Co.	110	Iowa	379	598
Bottomley v. United States	1	Story	134	432
Bowen v. Hall	50	L. J. Q. B.	305	114
Bowes v. Aberdeen	58	Wash.	535	443
Bowles Co. v. Clark	59	Wash.	336	463
Brace & Hergert Mill Co. v. State	49	Wash.	326	198
Bradley v. Harter	156	Ind.	499	359
Brier v. Traders' Nat. Bank	24	Wash.	695	8
Brodack v. Morsbach	38	Wash.	72	620
Brown v. Barse	42	N. Y. Supp.	306	31
Brown v. Cowell	116	Mass.	461	313
Brown's Estate v. West Seattle	43	Wash.	26	389
Buell v. Aberdeen State Bank	58	Wash.	407	403
Burian v. Seattle Elec. Co.	26	Wash.	606	287
Burlington Ins. Co. v. Brockway	138	Ill.	644	596
Butterfield v. Cowing	112	N. Y.	486	313
Button v. Hoffman	61	Wis.	20	512
Byram v. Sovereign Camp W. O. W.	108	Iowa	430	82
Byxbie v. Wood	24	N. Y.	607	571
Calvert v. London Dock Co.	2	Keen	638	477, 481
Carlson v. Wilkeson Coal & Coke Co.	19	Wash.	473	504
Carter v. Kingman	103	Mass.	517	518
Cau v. Texas & Pac. R. Co.	194	U. S.	427	456
Central of Ga. R. Co. v. Ashley	159	Ala.	145	44

			Page
Cherry v. Williams	147	N. C. 452	54, 233
Chicago v. Cook	105	Ill. App. 353	252
Chicago City R. Co. v. Brecher	112	Ill. App. 106	656
Chicago etc. R. Co. v. Crose	113	Ill. App. 547	656
Childs v. Smith	58	Wash. 148	661
Chipley v. Atkinson	23	Fla. 206	116
Christianson v. Pacific Bridge Co.	27	Wash. 582	346
Christy v. Elliott	216	Ill. 31	22
City of Atlanta v. Warnock	91	Ga. 210	540
City of Eufaula v. Simmons	86	Ala. 515	540
City of Evansville v. Decker	84	Ind. 325	540
City of Ord v. Nash	50	Neb. 335	656
Clambey v. Copland	52	Wash. 580	459
Clark v. Great Northern R. Co.	37	Wash. 537	331
Clerf v. Montgomery	15	Wash. 483	394
Cleveland v. Citizens Gas Light Co.	20	N. J. Eq. 201	235
Coats v. Seattle Elec. Co.	39	Wash. 386	562
Coffey v. Seattle Elec. Co.	59	Wash. 686	185, 384
Cole v. Hines	81	Md. 476	491
Columbus Gas. etc. Co. v. Freeland.	12	Ohio St. 392	52
Comer v. Granniss	75	Ga. 277	367
Commonwealth v. Bigelow	8	Met. 235	431
Commonwealth v. Eastman	1	Cush. 189	432
Commonwealth v. Jackson	132	Mass. 16	431
Commonwealth v. Stone	4	Met. 43	431
Compton v. Newton	129	Ga. 619	621
Conine v. Olympia Logging Co.	36	Wash. 345	18
Conner v. Clapp	42	Wash. 642	664
Costa v. Pacific Coast Co.	26	Wash. 138	18
Cowles v. United States Fid. etc. Co.	32	Wash. 120	475, 476
Crane Co. v. Pacific Heat & P. Co.	36	Wash. 95	464
Criss v. Seattle Elec. Co.	38	Wash. 320	562
Crooker v. Pacific Lounge etc. Co.	34	Wash. 191	59, 503
Cummings v. Newell	86	Minn. 130	612, 613
Cunningham v. Union Pac. R. Co.	4	Utah 206	649
Currans v. Seattle etc. R. & N. Co.	34	Wash. 512	18
Curtis v. Barber Asphalt Pav. Co.	44	Wash. 334	650
Czarecki v. Seattle etc. R. & N. Co.	30	Wash. 288	18
Dabney v. Smith	38	Wash. 40	634
Daffron v. Majestic Laundry Co.	41	Wash. 65	57, 528
Dalgardno v. Barthrop	40	Wash. 191	660
Dambmann v. Schulting	75	N. Y. 55	367
Danville v. Shelton	76	Va. 325	6
Davidson v. New Orleans	96	U. S. 97	606
Davis v. Boston & M. R. Co.	70	N. H. 519	340
Davis v. Buffum	51	Me. 160	64
Davis v. Coeur d'Alene & S. R. Co.	47	Wash. 301	562

				Page
Davis v. Lee	52	Wash.	330	398
Deaconess Home etc. v. Bontjes	207	Ill.	553	51, 233
Dean v. Walla Walla	48	Wash.	75	3
De Loach Mill Mfg. Co. v. Tutweiler Coal etc. Co	2	Ga. App.	493	656
Dennis v. Northern Pac. R. Co	20	Wash.	320	72
Denny v. Seattle, R. & S. R. Co	60	Wash.	426	174
Denny v. Spurr	38	Wash.	347	475
Denny v. Stout	59	Neb.	731	557
Denver etc. R. Co. v. Buffehr	30	Colo.	27	340
Desjardins v. St. Paul & T. Lum. Co.	34	Wash.	283	377
Detroit v. Detroit etc. R. Co	184	U. S.	368	444
Dimuria v. Seattle Transfer Co	50	Wash.	633	283
Dixon v. Baker	65	Ill.	518	540
Dodds v. Gregson	35	Wash.	402	178
Dolan v. Boott Cotton Mills	185	Mass.	576	60
Doremus v. Hennessy	176	Ill.	608	114
Dorsey v. Packwood	12	How. (U. S.)	126	360
Doud v. Citizens' Ins. Co	141	Pa.	47	596
Douglas v. Hanbury	56	Wash.	63	135, 491
Doyle v. Great Northern R. Co	43	Wash.	558	221
Driscoll v. Dufur	45	Wash.	494	179
Driver's Adm'r v. Southern R. Co	103	Va.	650	262
Dryden v. St. Louis Transit Co	120	Mo. App.	424	44
Dubcich v. Grand Lodge	33	Wash.	651	82
Dunkin v. Hoquiam	56	Wash.	47	124
Dygert v. Pletts	25	Wend.	402	206
Eckert v. Schmitt	60	Wash.	23	417
Eddy v. Cedar Rapids etc. Co	98	Iowa	626	286
Edwards v. Elliott	21	Wall.	532	399
Eichman v. Buchteit	128	Wis.	385	22
Eisenbach v. Hatfield	2	Wash.	236	198, 199
El Reno Elec. L. & T. Co. v. Jennison	5	Okl.	759	182
Employing Printers' Club v. Doctor Blosser Co.	122	Ga.	509	117
Engelking v. Spokane	59	Wash.	446	354, 631
Erickson v. McNeeley & Co	41	Wash.	509	527
Eskildsen v. Seattle	29	Wash.	583	18
Ettor v. Tacoma	57	Wash.	50	253
Everett v. Paschall	61	Wash.	47	231, 233
Exchange Bank v. Macon Const. Co.	97	Ga.	1	512
Fallbrook Irr. Dist. v. Bradley	164	U. S.	112	606
Faulkner v. Seattle	19	Wash.	320	3

			Page
Felton v. Bullard	94	Fed. 781	649
Fireman's Fund Ins. Co. v. Oregon R. & Nav. Co	58	Wash. 332	649
Florin v. Florin	49	Wash. 37	105
Fogg v. Hoquiam	23	Wash. 340	8
Ford v. Jones	22	Wash. 111	105
Ford v. Mt. Tom Sulphite Pulp Co.	172	Mass. 544	60
Forman v. Whitney	2	Keyes (N. Y.) 165	52
Franklin Sav. Bank v. Moran	19	Wash. 200	602
Frazer v. Miller	7	Wash. 521	462
Friedman v. Manley	21	Wash. 43	78
Frost v. Washington County R. Co.	96	Me. 76	200
Fuller v. New York etc. R. Co.	175	Mass. 424	10
Fulton v. McAfee	5	How. (Miss.) 751	318
Furnace v. State	153	Ind. 93	534
Garvey v. Barkley	56	Wash. 24	492
Gerber v. Aetna Indemnity Co	61	Wash. 184	384
German Ins. Co. v. Davis	40	Neb. 700	597
Gifford v. Horton	54	Wash. 595	206, 575, 612
Gilbert v. Showerman	23	Mich. 447	234
Glenn County v. Jones	146	Cal. 518	477
Gomm v. Oregon R. & Nav. Co	52	Wash. 685	453
Goodrich v. Kimble	49	Wash. 516	105
Grant v. Armstrong	55	Wash. 365	22
Graves v. Graves	48	Wash. 664	417
Gray v. Washington W. P. Co.	30	Wash. 665	673
Grays Harbor Boom Co. v. Lowns-dale	54	Wash. 83	198
Great Luxembourg R. Co. v. Magney	25	Beav. 586	590
Green v. Okanogan County	60	Wash. 309	188
Green v. Western American Co.	30	Wash. 87	218, 219, 221, 261, 527
Griffin v. Tacoma	49	Wash. 524	2, 6, 8
Grover v. Zook	44	Wash. 494	52
Grunwald v. Freese (Cal.)	34	Pac. 73	557
Gulf etc. R. Co. v. Stanley	89	Tex. 42	457
Gulf etc. R. Co. v. Wilkins (Tex. Civ. App.)	32	S. W. 351	340, 342
Gunther v. Huneke	58	Wash. 494	210
Gustafson v. West Lumber Co.	51	Wash. 25	99
Gustin v. Crockett	51	Wash. 67	244
Hall v. City of Austin	73	Minn. 134	31
Hall v. West & Slade Mill Co.	39	Wash. 447	96, 122, 220, 261, 263, 527
Hammond v. Hopkins	143	U. S. 224	312
Hampe v. Pittsburg & B. Trac. Co.	165	Pa. St. 468	44

			Page
Hansen v. Seattle Lumber Co.	41	Wash. 349	527
Harned v. Missouri Pac. R. Co.	51	Mo. App. 482	457
Hart v. Meillsville	125	Wis. 546	540
Hart v. Pennsylvania R. Co.	112	U. S. 331	453
Hays v. Merchants' Bank etc.	10	Wash. 573	611
Heffernan v. United States Fid. etc. Co.	37	Wash. 477	475
Heffinger v. Minneapolis etc. R. Co.	43	Minn. 503	342
Heidegger v. Metropolitan St. R. Co.	126	S. W. (Mo. App.) 990	43
Heighes v. Dollarville Lumber Co.	113	Mich. 518	64
Helliesen v. Seattle Elec. Co.	56	Wash. 278	283, 285
Hengstler v. Flint etc. R. Co.	125	Mich. 530	456
Henry v. Seattle Elec. Co.	55	Wash. 444	338
Heywood v. Tillson	75	Me. 225	111
Hicks v. United States	2	Okl. Cr. 626	404
Higgins v. State	64	Md. 419	211, 212
Hilgar v. Walla Walla	50	Wash. 470	346
Hill v. Hill	7	Wash. 409	305
Hill v. Indianapolis etc. R. Co.	31	Ind. App. 98	342
Hill v. Northern Pac. R. Co.	33	Wash. 697	452
Hinckley v. Germania Fire Ins. Co.	140	Mass. 38	598, 599
Hipkins v. Estes	51	Wash. 1	310
Holmes v. Southern Pac. R. Co.	97	Cal. 161	342
Hoover v. Mercantile etc. Ins. Co.	93	Mo. App. 111	598
Horak v. Thompson (Iowa)	83	N. W. 889	64
Horton v. Seattle	53	Wash. 316	301
Hoseth v. Preston Mill Co.	49	Wash. 682	631
Hotchkin v. Bussell	46	Wash. 7	612
House v. Cramer	134	Iowa 374	22
Houston etc. R. Co. v. Davis	11	Tex. Civ. App. 24	457
Hoveland v. Hall Bros. R. etc. Co.	41	Wash. 164	527
Howe v. Northern Pac. R. Co.	30	Wash. 569	18
Huggard v. Glucose Sugar Ref. Co.	132	Iowa 724	656
Hughes v. Oregon Imp. Co.	20	Wash. 294	263
Hunter v. Porter	10	Idaho 72	77
Hutchinson v. Mt. Vernon Water & Power Co.	49	Wash. 469	334
Hyde v. Noble	13	N. H. 494	518
Indiana Springs Co. v. Brown	165	Ind. 465	21, 22
In re Blewett Street	59	Wash. 485	544
— Littlefield	61	Wash. 150	624
— Pike Street	42	Wash. 551	364
— Third Avenue	54	Wash. 460	575
— Third etc. Avenues	49	Wash. 109	248
— Third etc. Avenues	55	Wash. 519	498
— Westlake Avenue	40	Wash. 144	498

				Page
Insurance Co. etc. v. Pitts	88	Miss.	587	598, 599
Ireland v. Scharpenberg	54	Wash.	558	649
Jackson v. Lamar	58	Wash.	383	237
James v. James	51	Wash.	60	417
Jancko v. West Coast Mfg. etc. Co.	34	Wash.	556	13
Jasperson v. Scharnikow	150	Fed.	571	621
Jensen v. Spokane Falls & N. R. Co.	51	Wash.	448	452
Jessup v. Illinois Cent. R. Co	36	Fed.	735	513
Jock v. Columbia & P. S. R. Co	53	Wash.	437	377
Johanson v. Webster Mfg. Co	139	Wis.	181	10, 12
Johnson v. Caughren	55	Wash.	125	17
Johnson v. Far West Lumber Co	47	Wash.	492	221
Johnson v. Irwin	16	Wash.	652	395
Johnson v. Motor Shingle Co	50	Wash.	154	37
Johnson v. Northern Lumber Co	42	Wash.	230	57
Johnson v. Williams	22	N. Y. Supp.	247	206
Johnston v. Northern Lumber Co	42	Wash.	230	528
Johnstone v. Richmond etc. R. Co	39	S. C.	55	456
Jones v. Herrick	33	Wash.	197	179
Jones v. Hoge	47	Wash.	663	22
Jordan v. Osgood	109	Mass.	457	432
Kaiser Land & Fruit Co. v. Curry	155	Cal.	638	93
Kansas etc. R. Co. v. Ayers	63	Ark.	331	457
Karasek v. Peier	22	Wash.	419	444
Kavanagh v. Wilson	70	N. Y.	177	649
Keating v. Pacific Steam Whaling Co.	21	Wash.	415	18
Keeble v. Hickeringill	11	East	574	113
Keefe v. Seattle Elec. Co	55	Wash.	448	338
Keith v. United States	8	Okl.	446	143
Kelley v. Greenough	9	Wash.	659	334
Kelley v. New York City R. Co	192	N. Y.	97	44
Kelso v. Russell	33	Wash.	474	462
Kennedy v. McAllister	52	N. Y. Supp.	714	649
Kerr v. Kuydendall	44	Miss.	137	318, 320
Kidder v. Wittler-Corbin Mach. Co.	38	Wash.	179	692
Koons v. St. Louis Car Co	203	Mo.	227	557
Koshkonong v. Burton	104	U. S.	668	628
Krakow v. Wille	125	Wis.	284	612, 613
Laidley v. Musser Lumber & Mfg. Co.	45	Wash.	239	99
Lake Koen etc. Irr. Co. v. McLain Land etc. Co	69	Kan.	339	274
Lampe v. Jacobsen	47	Wash.	663	22
Laub v. Buckmiller	17	N. Y.	620	206
Lawson v. Black Diamond Coal Co.	53	Wash.	614	380

			Page
Lawton v. Steele	152	U. S. 133	444
Leghorn v. Nydell	39	Wash. 17	475
Leiendecker v. Aetna Indemnity Co.	52	Wash. 609	477, 480, 481
Levy v. Seattle	61	Wash. 540	696
Lewis v. People	37	Mich. 517	163
Locke v. McVean	33	Mich. 473	480
Lommen v. Minneapolis Gaslight Co.	65	Minn. 196	401
London Guarantee etc. Co. v. Horn	206	Ill. 493	115
Long v. Eisenbeis	21	Wash. 23	8
Louisville etc. R. Co. v. Nitsche	126	Ind. 229	573
Lownsdale v. Grays Harbor Boom Co.	54	Wash. 542	198
Lumley v. Gye	22	L. J. Q. B. 463	114
Mabie v. Whittaker	10	Wash. 656	396
McCarthy v. Consolidated R. Co.	79	Conn. 73	173
McCarthy v. Gallagher	23	N. Y. Supp. 884	169
McCartney v. Chicago etc. R. Co.	112	Ill. 611	42
McClellan v. O'Conner	47	Wash. 121	105
McCummins v. State	132	Wis. 236	22
McGuinness v. Hargiss	56	Wash. 162	578
McIntyre v. Orner	166	Ind. 57	22
McKenzie v. North Coast Colliery Co.	55	Wash. 495	346
McKenzie v. Oregon Imp. Co.	5	Wash. 409	61
McMillan v. Michigan etc. R. Co.	16	Mich. 79	456
McMinn v. Pittsburg etc. R. Co.	147	Pa. St. 5	571
McPherson Bros. Co. v. Okanogan County	45	Wash. 285	240
McPherson Bros. Co. v. Okanogan County	61	Wash. 239	244
McQuillan v. Seattle	10	Wash. 464	286
Maddox v. State	68	Ga. 294	265
Malfa v. Crisp	52	Wash. 509	182
Malone v. Crescent City M. & T. Co.	77	Cal. 38	334
Manvell v. Weaver	53	Wash. 408	26
May v. Sutherlin	41	Wash. 609	621
Mayor v. Dry Dock etc. R. Co.	133	N. Y. 104	443
Mayor of Valverde v. Shattuck	19	Colo. 104	388
Maxwell v. Dow	176	U. S. 581	399
Mey v. Seattle Elec. Co.	47	Wash. 497	283, 284
Meyers v. Hudson Iron Co.	150	Mass. 125	60
Miggett's Appeal	109	Pa. St. 520	313
Mischke v. Seattle	26	Wash. 616	655
Missouri Pac. R. Co. v. Bolling	48	S. W. (Ark.) 806	512
Missouri Pac. R. Co. v. Moseley	57	Fed. 921	340

			Page
Mizzell v. Southern R. Co.	132	Ala. 504	342
Monro v. National Surety Co.	47	Wash. 488	475
Moran v. Dunphy	177	Mass. 485	117
Morrill v. Moulton	40	Vt. 242	518
Mrozevich v. Western Steel Corp.	61	Wash. 668	672
Muir v. Johnson	49	Wash. 66	198, 199
Murray v. Shoudy	13	Wash. 33	257
Myers v. Hudson Iron Co.	150	Mass. 125	504
Narramore v. Cleveland etc. R. Co.	96	Fed. 298	218, 220
Nashville etc. R. Co. v. Stone etc.	112	Tenn. 348	456
National Bank v. Colby	88	U. S. 609	92
Neal v. Carolina Cent. R. Co.	126	N. C. 634	340
Nelson v. Boynton	3	Met. (Mass.) 396	280
Nelson v. Title Trust Co.	52	Wash. 258	398
Nelson v. Western Steel Corp.	61	Wash. 672	670, 671
New Whatcom v. Bellingham Bay Imp. Co.	9	Wash. 639	254
Nims v. Troy	59	N. Y. 500	540
Nordstrom v. Spokane etc. R. Co.	55	Wash. 521	10, 568
Norman v. Hopper	38	Wash. 415	356
North Jersey St. R. Co. v. Jersey City	75	N. J. L. 349	443
Norton v. Union R. Co.	109	N. Y. Supp. 73	44
Olson v. Erickson	53	Wash. 458	354
Olson v. Snake River Valley R. Co.	22	Wash. 139	182, 184
Olson v. Title Trust Co.	58	Wash. 599	241
Ormsby v. Union Pac. R. Co.	4	Fed. 170	457
Pachko v. Wilkeson Coal & Coke Co.	46	Wash. 422	261, 263
Pantages v. Seattle Elec. Co.	55	Wash. 453	17
Pearson v. Yewdall	95	U. S. 294	399
Peirce v. Wheeler	44	Wash. 326	532
Penley v. Waterhouse	1	Iowa 498	628
People v. Backus	117	N. Y. 196	480
— v. Corey	148	N. Y. 476	485
— v. Detroit etc. R. Co.	116	Mich. 132	440
— v. Gebhard	151	Mich. 192	144
— v. Harding	53	Mich. 48	401
— v. Mead	50	Mich. 228	403
— v. Strait	154	N. Y. 165	485
— v. Wood	126	N. Y. 249	484
People ex rel. Linton v. Brooklyn Heights R. Co.	75	N. Y. Supp. 202	42
People ex rel. Raymond v. Latham	203	Ill. 9	249, 251
Pepper v. Addicks	153	Fed. 383	591
Perkins v. Pendleton	90	Me. 166	117
Perkins' Exr's v. Winter's Adm'rx.	7	Ala. 855	318

				Page
Peters v. Mackay	20	Wash.	172	477
Peterson v. Tacoma R. & Power Co.	60	Wash.	406	440
Petz v. Detroit	95	Mich.	169	445
Phillipos v. Mihran	38	Wash.	402	519
Pierson v. Northern Pac. R. Co.	52	Wash.	595	452
Pincus v. Puget Sound Brewing Co.	18	Wash.	108	567
Port Angeles Pac. R. Co. v. Cooke	38	Wash.	184	272, 687
Port Angeles Southern Co. v. Barbare	46	Wash.	275	272
Port Blakely Mill Co. v. Springfield Fire etc. Ins. Co	59	Wash.	501	598
Porter v. Pittsburg etc. Steel Co.	120	U. S.	649	513
Power v. Kitching	10	N. D.	254	621
Pringle v. Pringle	55	Wash.	93	149
Pugh v. Oregon Imp. Co	14	Wash.	331	263
Pullman's Palace Car Co. v. Missouri Pac. R. Co	115	U. S.	587	511
Purington v. Hinchliff	219	Ill.	159	115
Quinn v. Boston Elevated R. Co.	188	Mass.	473	285
Raines v. Great Northern R. Co.	53	Wash.	570	342
Ralph v. American Bridge Co	30	Wash.	500	18
Randall v. Hazleton	12	Allen	412	111
Rasmussen v. United States	197	U. S.	516	400
Raycroft v. Tayntor	68	Vt.	219	111
Real Estate & Imp. Co. v. Phillips	90	Md.	515	182
Rector v. Bryant Lumber etc. Co.	41	Wash.	556	99
Redford v. Spokane St. R. Co	15	Wash.	419	400
Reeder v. Traders' Nat. Bank	28	Wash.	139	567
Reese v. Knott	3	Utah	451	402
Regina v. Arnaud	16	L. J. Q. B.	50	513
Regina v. Francis	L. R. 2	C. C.	128	431
Reynolds, Ex parte		Fed. Cas. No.	11,719	143
Reynolds v. Reynolds	42	Wash.	107	634
Risk v. Kansas Trust etc. Co	58	Fed.	45	692
Roberts v. Pacific etc. R. Co	121	Fed.	785	557
Robinson v. Bird	158	Mass.	357	518
Roessler etc. Ch. Co. v. Peterson	134	Fed.	789	10, 11
Rogers v. Trumbull	32	Wash.	211	257
Ross v. Butler	19	N. J. Eq.	294	52, 233
Roth v. Union Depot Co	13	Wash.	525	341
Rothchild Bros. v. Mahoney	51	Wash.	633	452, 548
Rothchild Bros. v. Rollinger	32	Wash.	307	661
Sackman v. Thomas	24	Wash.	660	261
Sage v. Hawley	16	Conn.	106	628
St. Louis etc. R. Co. v. Mathews	165	U. S.	1	445
San Antonio Gas Co. v. Robertson	93	Tex.	503	10, 12

				Page
Sankey's Ex'rs v. First Nat. Bank.	78	Pa. St.	48	367
Schuchard v. Seattle	51	Wash.	41	544
Schwede v. Hemrich Bros. Brew. Co.	29	Wash.	21	575
Scott v. Pennsylvania R. Co.	130	N. Y.	679	342
Scott v. Sloan	72	Kan.	545	613
Seaman v. Marshall	116	Mass.	327	540
Seattle v. Seattle Elec. Co.	48	Wash.	599	575
Seattle v. Sylvester Cowen Inv. Co.	55	Wash.	659	248
Seattle & M. R. Co. v. Carraher	21	Wash.	491	612
Seymour v. Cummins	119	Ind.	148	540
Shackelton v. Sun Fire Office	55	Mich.	288	597
Sharp v. Missouri Pac. R. Co.	161	Mo.	214	342
Shaw v. Spencer	57	Wash.	587	170
Shaw v. Woodland Shingle Co.	61	Wash.	56	504
Shepard v. Seattle	59	Wash.	363	55
Sherman v. Sweeny	29	Wash.	321	679
Shinkle v. McCullough	116	Ky.	960	22
Sholin v. Skamania Boom Co.	56	Wash.	303	290
Shorett v. Signor	58	Wash.	89	206
Shreffler v. Nadelhoffer	133	Ill.	536	480
Simmons v. Vulcan Oil & Min. Co.	61	Pa. St.	202	590
Sipes v. Puget Sound Elec. R.	54	Wash.	47	59, 261, 504
Skagit County v. Stiles	10	Wash.	388	602
Skinner v. Tacoma R. & Power Co.	46	Wash.	122	283
Slauson v. Schwabacher Bros. & Co.	4	Wash.	783	571
Snohomish County v. Hayward	11	Wash.	429	602
Sommer v. Carbon Hill Coal Co.	89	Fed.	54	261
Spaven v. Lake Shore etc. R. Co.	130	Mich.	579	340
Spokane v. Security Sav. Soc.	46	Wash.	150	661
Spokane Canal Co. v. Coffman	54	Wash.	645	358
Spokane Falls v. Browne	3	Wash.	84	257
Sroufe v. Moran Bros. Co.	28	Wash.	381	18
Stangair v. Roads	41	Wash.	583	382
Stanton v. Chicago	154	Ill.	23	299
State v. Aschenbrenner	45	Wash.	125	179
— v. Belknap	44	Wash.	605	404
— v. Bliss	27	Wash.	463	534
— v. Bokien	14	Wash.	403	413, 428-430
— v. Bringgold	40	Wash.	12	392
— v. Burton	27	Wash.	528	403
— v. Butts	42	Wash.	455	534
— v. Carpenter	56	Wash.	670	553
— v. Craemer	12	Wash.	217	265, 403
— v. Crotts	22	Wash.	245	404
— v. Dana	59	Wash.	30	413
— v. De Pasquale	39	Wash.	260	404

			Page
State v. Drusinman	34	Wash. 257	553
— v. Elswood	15	Wash. 453	553
— v. Gainor	84	Iowa 209	403
— v. Gohl	46	Wash. 408	404
— v. Gottfreedson	24	Wash. 398	403, 413, 428-430
— v. Hill	45	Wash. 694	553
— v. Hyde	20	Wash. 234	404
— v. Hyde	22	Wash. 551	413
— v. Jahns	61	Wash. 636	654
— v. Krug	12	Wash. 288	409
— v. Kruger	60	Wash. 542	630
— v. McClear	11	Nev. 39	401
— v. McCormick	56	Wash. 469	534
— v. McCullum	18	Wash. 394	130
— v. McGonigle	14	Wash. 594	554
— v. McGowan	36	Mont. 422	486
— v. Maldonado	21	Wash. 653	553
— v. Mamlock	58	Wash. 631	144
— v. Manville	8	Wash. 523	552
— v. Melvern	32	Wash. 7	631
— v. Messner	43	Wash. 206	230
— v. Molleson	148	N. Y. 241	479
— v. Montgomery	56	Wash. 443	130
— v. Murphy	13	Wash. 229	505
— v. Murphy	15	Wash. 98	552
— v. Newcomb	58	Wash. 414	400
— v. Nicoll	40	Wash. 517	389
— v. Nordstrom	7	Wash. 506	411
— v. Norris	27	Wash. 453	413
— v. Oppenheimer	41	Wash. 630	403, 428-430
— v. Phillips	59	Wash. 252	404
— v. Pittam	32	Wash. 137	430
— v. Porter	213	Mo. 43	486
— v. Quinn	56	Wash. 295	392
— v. Seaton	26	Wash. 305	179
— v. Shields	45	Conn. 256	267
— v. Simmons	52	Wash. 132	505
— v. Storey	51	Wash. 630	210
— v. Strasburg	60	Wash. 106	401
— v. Straub	16	Wash. 111	392
— v. Surry	23	Wash. 655	404
— v. Thield	36	Wash. 365	404
— v. Thompson	14	Wash. 285	413
— v. Van Cleve	5	Wash. 642	391
— v. Yandell	34	Wash. 409	179
State ex rel. American Sav. Union v. Whittlesey	17	Wash. 447	606

		Page
State ex rel. Birchmore v. State Board of Canvassers...	78 S. C. 461.....	389
— Brown v. McQuade.....	36 Wash. 579.....	625
— Burke v. Board etc.....	58 Wash. 511.....	684
— Cicoria v. Corgiat.....	50 Wash. 95.....	82
— Donofrio v. Humes.....	34 Wash. 347.....	273
— Gillette v. Clauson.....	44 Wash. 437.....	625
— LaFurgey v. Sup'r Ct.....	47 Wash. 154.....	625
— Lloyd v. Sup'r Ct.....	55 Wash. 347.....	149
— Miller v. Sup'r Ct.....	40 Wash. 555.....	625
— Mullen v. Doherty.....	16 Wash. 382.....	401
— Oregon R. & Nav. Co. v. Railroad Commission..	52 Wash. 17.....	211
— Sutton v. Fasse.....	71 S. W. (Mo. App.) 745...	654
— Washington Dredg. & Imp. Co. v. Moore.....	21 Wash. 629.....	625
— West Seattle v. Sup'r Ct..	36 Wash. 566.....	389
— Wilson v. Grays Harbor & P. S. R. Co.....	60 Wash. 32.....	612
— Wyman etc. Co. v. Sup'r Ct.	40 Wash. 443.....	683
— Young v. Denny.....	34 Wash. 56.....	625
State, Gleason Pros. v. Bergen....	33 N. J. L. 72.....	6
State, Trenton Horse R. Co. v. Trenton	53 N. J. L. 132.....	442
Staver etc. v. Missimer.....	6 Wash. 173.....	334
Steele v. Northern Pac. R. Co.....	21 Wash. 287.....	341
Stensgaard etc. v. National Fire Ins. Co.	36 Minn. 181.....	597
Stenzhorn v. City Elec. R. Co.....159	Mich. 82.....	286
Stettheimer v. Killip.....	75 N. Y. 282.....	367
Stokes v. People etc.....	53 N. Y. 164.....	401
Stotler v. Rochelle (Kan.).....109	Pac. 788.....	53
Struntz v. Hood.....	44 Wash. 99.....	382
Sullivan v. Treen.....	13 Wash. 261.....	182
Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.....	75 S. C. 76.....	599
Sutton v. Snohomish.....	11 Wash. 24.....	655
Sweeney v. Waterhouse & Co.....	43 Wash. 613.....	241
Synot v. Cumberland.....117	Fed. 379.....	586
Taussig v. Southern Mill & Land Co. 124	Mo. App. 209.....	557
Terrell v. Kirkey.....	14 Ala. 209.....	320
Terry v. Bamberger.....	44 Conn. 558.....	518
Thacker Coal etc. Co. v. Burke.....	59 W. Va. 253.....	116
Thirsk v. Evans.....211	Pa. St. 239.....	182
Thompson v. Utah.....170	U. S. 343.....	400

				Page
Thompson-Spencer Co. v. Thompson	49	Wash.	170	548
Thomson v. Issaquah Shingle Co...	43	Wash.	253....59, 98, 504,	527
Thoraldson v. Hatch	87	Minn.	168	613
Thurston v. St. Joseph	51	Mo.	510	540
Title Guaranty & Trust Co. v. Murphy	52	Wash.	190	475
Titlow v. Cascade Oatmeal Co....	16	Wash.	676	687
Town of Oxanna v. Allen	90	Ala.	468.....447,	449
Townsend v. Circleville	78	Ohio St.	122	447
Traders' Ins. Co. v. Catlin	163	Ill.	256	598
Traders' Ins. Co. v. Race (Ill.)	29	N. E.	846	597
Tucker v. Baltimore & O. R. Co....	59	Fed.	968	342
Twitchell v. Commonwealth	7	Wall.	321	399
Ufford v. Wilkins	33	Iowa	110	318
Ungrich v. Ungrich	115	N. Y. Supp.	413	318
Union Pac. R. Co. v. Hall	91	U. S.	343	45
United States v. Hurshman	53	Fed.	543	143
United States v. Ward	42	Fed.	320	143
Van Hook v. Selma	70	Ala.	361	443
Van Pelt v. Davenport	42	Iowa	308	540
Vaughn v. Scade	30	Mo.	600	400
Volkmar v. Manhattan R. Co.	134	N. Y.	418	648
Von Arx v. San Francisco Gruetli Verein	113	Cal.	377	82
Von Postel v. Lake Sammamish Shingle Co.	51	Wash.	261	329
Wabash R. Co. v. Farrell	79	Ill. App.	508	60
Ward v. Meredith	220	Ill.	66	22
Ward v. Springfield etc. Ins. Co....	12	Wash.	631	687
Watson v. White	152	Ill.	364	491
Weckler v. Chicago	61	Ill.	142	249
Weed v. Foster	58	Wash.	675	571
Weed v. Goodwin	36	Wash.	31	248
Wehrung v. Denham	42	Ore.	386	477
Weinberg v. Naher	51	Wash.	591	270
West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.	31	Wash.	610	207
Westcott v. Middleton	43	N. J. Eq.	478	284
Western R. Co. v. Harwell	97	Ala.	341	457
Western Timber Co. v. Kalama Riv. Lum. Co.	42	Wash.	620	664
West Jersey R. Co. v. Trenton Car Works Co.	32	N. J. L.	517	518
Wharton v. Tacoma Fir Door Co....	58	Wash.	124	10
Wheeler v. Caldwell	68	Kan.	776	400
Whelan v. Washington Lumber Co..	41	Wash.	153.....261,	527

		Page
White v. Pecos Land & Water Co...	18 Tex. Civ. App. 634.....	513
White v. Spokane & Inland Empire R. Co.	54 Wash. 670.....	650
Wickstrom v. Preston Mill Co.....	48 Wash. 164.....	329
Wilkerson v. State.....	31 Tex. Cr. 86.....	403
Wilson v. Waldron.....	12 Wash. 149.....	78
Wilson v. Wold.....	21 Wash. 398.....	398
Windmiller v. Northern Pac. R. Co.	52 Wash. 613.....	453
Winer v. Bank of Blytheville.....	89 Ark. 435.....	194
Winston v. Spokane.....	12 Wash. 524.....	3
Wolferman v. Bell.....	8 Wash. 140.....	687
Wollin v. Smith.....	27 Wash. 349.....	179
Woods v. Globe Nav. Co.....	40 Wash. 376.....	567
Woods v. Nichols.....	21 R. I. 537.....	518
Woodward v. Nims.....130	Mass. 70.....	206
Woolf v. Washington R. & Nav. Co.	37 Wash. 491.....	342, 562
Work v. State.....	2 Ohio St. 296.....	401
Wright v. Tacoma Gas & Elec. L. Co.	53 Wash. 262.....	587
Yakima Valley Bank v. McCallister	37 Wash. 566.....	432
York Mfg. Co. v. Cassell.....201	U. S. 344.....	692
Young, Ex parte.....209	U. S. 123.....	447, 448
Zabriskie v. Smith.....	13 N. Y. 322.....	571
Zindorf Const. Co. v. Western Am. Co.	27 Wash. 31.....	179

STATUTES
CITED AND CONSTRUED

CONSTITUTION OF WASHINGTON.

	Page
Art. 1 § 16	272
" 1 § 21	400
" 4 § 16	404
" 11 § 11	445

PIERCE'S CODE.

Section 6523	261

REMINGTON AND BALLINGER'S CODE.

Section 94	399, 638, 654
" 101	407
" 207, 208, 209	682
" 216	683
" 226	627
" 252	257
" 299	184
" 393	179
" 785	694
" 788	620
" 809	577
" 939	574
" 943, 944	290
" 948	382
" 1134, 1147	182
" 1211	635
" 1716	691
" 2059	534
" 2140	408
" 2392	637
" 2414, subd. 3, 4	630
" 2445	674
" 2578, 2579	414
" 3443	463
" 3520	421
" 3715	91, 452, 548
" 3715a	91

REMINGTON AND BALLINGER'S CODE—*Continued.*

	Page
Section 4798	387
" 4945	390
" 5141	573
" 5289	278, 423
" 5570	22
" 5917	395
" 6587	37, 57, 58, 122, 139
" 6593	58
" 7381	260
" 7382	260
" 7445	387
" 7507, subd. 9	445, 446
" 7507, subds. 36, 52	446
" 7787	251
" 7790, 7795, 7796	363
" 8166	601
" 8178, 8180, 8188	603
" 8192	604
" 8195	605
" 8309	50
" 8316	290
" 8369	452
" 8373	452
" 8386	150
" 8399	151, 624
" 8670	197
" 8787	395

SESSION LAWS.

1888, p. 41, § 15	261
1891, p. 152	261
1895, p. 18	6
1903, pp. 231, 232	298
1905, p. 110	423
p. 164, § 1	37

SESSION LAWS—*Continued.*

	Page
1907, p. 270	91
p. 271, § 7	452
p. 288	452
p. 323, § 20	251
p. 676	387
1909, p. 131	399
p. 132, §§ 3, 4	407
p. 132, § 7	408
p. 677	150
p. 677, § 13	151
1909, Special Session, p. 8	601
p. 8, §§ 11, 13, 15, 23, 27, 30	603-605
p. 57	91
p. 66, § 1	674

CHARTERS.

	Page
Seattle, art. 4, § 10	247
Tacoma, art. 12	190
Tacoma, § 49	3
Tacoma, § 129	188
Tacoma, §§ 129, 130, 163	189, 190

ORDINANCES.

Seattle, No. 15,923	247
Tacoma, No. 152	437, 444
Tacoma, No. 188, § 6	438, 439, 444
Tacoma, No. 238, § 5	437, 439
Tacoma, No. 860, § 12	438, 439, 442, 444
Tacoma, No. 1,809, § 12	508
Tacoma, No. 3,264	3
Tacoma, No. 3,883	436-446

ERRATA

ERRORS NOTED IN PREVIOUS VOLUMES

VOLUME 51

Page 264, line 20 from top, for ability read inability

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 8980. Department Two. December 2, 1910.]

GEORGE MILTON SAVAGE, *Appellant*, v. THE CITY OF TACOMA, *Respondent*.[1]

MUNICIPAL CORPORATIONS—CHARTERS—ORDINANCES—ENACTMENT—ORDINANCES OBLIGATING CITY FOR PAYMENTS. Under a city charter providing that no ordinance "obligating the city for the payment" of more than a specified sum shall be passed before the second regular meeting of the council after its introduction, an ordinance passed on the day of its introduction is void where it provides for contracts for a water extension, and obligates the city to create a special fund for the benefit of the contract by setting aside fifty per cent of its gross revenues from its water system and obligates the city to pay such special fund to the contractor; "obligating the city," not being limited to the creation of a general indebtedness against the city.

SAME—MANDATORY PROVISIONS. Charter provisions prescribing a definite method for the enactment of ordinances are mandatory.

JUDGMENT—RES JUDICATA—MATTERS AND PARTIES CONCLUDED. A judgment in an action, apparently a moot case to determine the validity of a contract for a city water extension, in which the validity of the preliminary ordinances was assumed, and the contractor and the city were working in harmony to sustain the contract, attacked as illegal on other grounds, is not *res judicata* in a second action by the contractor against the city for breach of the contract, defended by the city on the ground that the preliminary ordinance authorizing the contract was void; since the matters involved and the parties in the second suit were different.

[1]Reported in 112 Pac. 78.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 17, 1910, on the pleadings, dismissing an action for breach of contract. Affirmed.

Marshall K. Snell, for appellant.

T. L. Stiles, *F. R. Baker*, and *Frank M. Carnahan*, for respondent.

Morris, J.—Appellant brought this action to recover damages alleged to have been sustained because of the failure of the city to keep and perform its contract providing for an extension to its water system, known as the Maplewood Springs Extension. He alleged the passage of the initial ordinance, the execution of the contract thereunder, the failure of the city to perform, and finally the repeal of the ordinance. There are other allegations in the complaint, but they are not material to the discussion of the points before us. The city answered, alleging the invalidity of the initial ordinance, in that it was not passed in accordance with the provisions of the charter and conferred no authority upon the commissioner of public works to enter into the contract, and that the contract itself was invalid because of certain irregularities. The facts alleged by the city, from which it drew its conclusions of invalidity and irregularity, were all admitted, so that the only question before the court was one of law, which was passed upon on motion for judgment upon the pleadings, the court sustaining the position of the city.

Appellant, in order to escape the legal contention of the city, contends (1) that the ordinance is valid, and (2) that the opinion and judgment of this court in *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107, which involved this same contract, are *res adjudicata* as to the questions now presented, and estop the city from questioning the legality of the ordinance. So that two questions are presented, was the ordinance valid; and, if not, is the city estopped by the rule of *res adjudicata*.

Section 49 of the city charter provides that:

"No ordinance obligating the city for the payment of more than one thousand dollars, or vacating any street, highway or alley, or granting any franchise or privilege shall be passed before the second regular meeting of the city council after its introduction, nor until read in full at two regular meetings of the council, and no ordinance granting a franchise shall be passed within thirty days from its introduction."

On March 4, 1908, Ordinance No. 3,264, entitled:

"An ordinance providing for the construction of a wood stave pipe line, intake, head works, pump house, all necessary work and machinery, and the acquiring of the necessary lands, right of way, easements and privileges for the purpose of bringing in water from Maplewood Springs, in Pierce county, and delivering the same to the low service reservoir in the city of Tacoma, providing for the letting of contracts therefor and for the payment thereof, and establishing a fund for such payment;"

was introduced in the city council, read a first time, and upon the same night passed to the second and third reading, and put upon its final passage. Upon its passage, it was submitted to the mayor, and was approved by him on March 5, 1908. This was in plain violation of the provisions of the charter *supra*, unless it can be held, as contended by appellant, that this ordinance does not fall within the provisions of the charter, in that it does not create a general indebtedness of the city.

In support of this contention he cites *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888; *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 365, and *Dean v. Walla Walla*, 48 Wash. 75, 92 Pac. 895, holding that where a city enters into a contract for the doing of some public work, the cost of which is not to be charged against the city generally, but against some special fund thereby created, and the only obligation assumed by the city is payment out of such special fund, the indebtedness thus contracted is not a general municipal indebtedness within the meaning of the constitutional limitation. No ques-

tion was raised in those cases touching the validity of the ordinance or contracts initiating the fund involved, except that the constitutional limitation was or would be exceeded. In other words, the ordinance was valid if the indebtedness was legal. So that it might be here held, if a like question were presented by this record, that if the ordinance by its terms established a special fund out of which payment for this water extension should be made, the indebtedness thus created is not a general municipal indebtedness.

But such is not the primary question here. There is here no contention as to whether the indebtedness created by this ordinance is a general or special indebtedness, but rather is this ordinance one "obligating the city for the payment of more than one thousand dollars." It is admitted that the contract entered into between the city and appellant called for more than $100,000 in payments to be made by warrants drawn on the Maplewood Extension Fund, which fund is created by the ordinance "by setting aside into said fund, from the gross revenues or proceeds from the water works system now belonging to, or which may hereafter belong to, said city, at least fifty per centum (50%) thereof." It was further provided that, "the comptroller of said city is directed to draw a warrant in payment," and "the city treasurer of said city is authorized and directed to pay the same." Under the ordinance, while the city did not contract for a general municipal indebtedness, it did contract for a special indebtedness and did thereby obligate itself to the establishment of a special fund and for the payment of the money in the special fund, which was, within the meaning of the ordinance, obligating itself for the payment of money as much as if a general indebtedness had been created. The character of the fund did not disturb the obligation; it only determined the character of the obligation and the manner of its enforcement.

"The obligation assumed by a public corporation under a contract may be general and payable from funds raised by general taxation or special and payable only from moneys

raised by special assessments upon designated property. In the former case the contractor or his assignee can compel payment from the general funds at the disposal of the corporation; if the obligation for the payment is based upon a special fund he is limited on his recovery to such fund." Abbott Municipal Corporations, § 294.

The words "obligating the city" cannot be limited to the creation of a general indebtedness against the city. They have a broader and more extended meaning. The city, under the ordinance, undertook an obligation to create this special fund for the benefit of the contract by setting aside fifty per centum of its gross revenues from its water system, and it further obligated itself to pay this fund to appellant. Each of these obligations which the city undertook under this ordinance was "obligating the city for the payment," first, of fifty per centum of its gross revenues from its water system into a special fund, and second, to pay the money in this special fund to appellant. The purpose of this provision in the city charter was to insure caution, deliberation, and a full understanding of the character of the expenditure, before it could obligate itself for the payment of public funds. Such purpose would be entirely done away with if appellant's construction be given to the charter. Many if not all the ordinances initiating great public improvements, undertaken by our municipalities, provide for the creation of a special fund to pay the costs of such improvement, or create a special assessment district in which the money shall be raised by special assessment upon property benefited. It would not do to give a construction to the charter which would permit ordinances of such a character to be rushed through a common council, without opportunity for deliberation and the exercise of due care and complete understanding of the character of the act, before it should assume the dignity of a municipal enactment and bind the city, either directly or indirectly, or a portion of its citizens, to the payment of large sums of money; thus removing the safeguards upon the power of the

municipality over the property of its citizens which are sought to be created by the charter provision. The charter provision having been violated, in the enactment of this ordinance, the ordinance was void, and no authority could be based upon it for the making of the contract which is made the basis of this action.

We believe it to be the law that, where a municipal charter prescribes a definite method for the enactment of ordinances, such requirements are mandatory, and no authority is vested in the law-making body of the municipality to pass ordinances except in the manner required by the charter. Dillon, Municipal Corporations (4th ed.), § 309; Abbott, Municipal Corporations, §525; Smith, Modern Law of Municipal Corporations, § 506; *State, Gleason Pros. v. Bergen*, 33 N. J. L. 72; *Avis v. Vineland*, 55 N. J. L. 285, 26 Atl. 149; *Danville v. Shelton*, 76 Va. 325.

The ordinance being void, no authority was thereby vested in the commissioner of public works to enter into the contract, and the contract, or its breach, could not be made the basis of an action at law; unless, as urged by appellant, the judgment in the *Griffin* case is *res adjudicata* and estops the city from now raising such contention. Reference is made to that case for a determination of the questions therein submitted to the court. It will be observed that the court there held: (1) That the Maplewood Springs extension was not an addition to the water system of the city requiring special ratification by the electors of the city, but such source of water supply was included in the ratification given by the election of 1893, which gave the city the authority to purchase and acquire all sources of water supply then owned by the Tacoma Light & Power Company; (2) that the contemplated extension was not a change in the adopted plan for supplying the city with water within the purview of the act 1895, found at page 18 of the session laws of that year; (3) that a temporary transfer of funds from the general fund to a special water fund was not prohibited by the city charter; (4) that the

pledging of water receipts, and the transfer from the general to a special water fund, did not obligate the city for a new indebtedness which it could not incur by reason of the constitutional limitation; (5) that the failure of the city comptroller to countersign the contract did not invalidate it.

None of these holdings involved the validity of the ordinance; nor was there in that case any suggestion of the invalidity of the ordinance, nor any facts such as here are disclosed from which the court in that case could have held the ordinance invalid. Its validity was assumed by all parties, except in so far as it was then contended that it established a general municipal indebtedness. The court, therefore, in that case could not have held, as we now hold, that this ordinance was void because of the violation of mandatory requirements of the charter, as to the manner of its passage. No such issue was tendered the court, nor was it possible under the issues of that case to frame such a controversy and submit it to the court for determination. It is almost apparent from the record of that case that there was no real controversy between the parties, but that the case was instituted as a moot case in order to determine a favorable construction of the contract, and thus forestall any controversy thereafter. The suit was commenced April 10, 1908, the city and this appellant answered April 13; reply was filed April 15, the cause submitted to the lower court for judgment April 18, and on April 20, the entire transcript and briefs of both appellant and respondents, with a stipulation to submit, were filed in this court. To constitute a judgment an estoppel, there must be an identity of parties and subject-matter and the same issue depending upon the same state of facts or the same transaction, although in relation to different rights or different property. But where the question in the second suit, although similar to that in the first, growing out of a different transaction or state of facts, is between different parties and, although growing out of the same subject-matter, involves a different question, there is no *res adjudicata* in

the first judgment. 23 Cyc. pp. 1237, 1299. The purpose of the *Griffin* suit was to enjoin the city from proceeding with the contract, upon the ground that it was illegal, for the reasons referred to by the court in its opinion. The causes of action here pleaded are breaches of contract, and the relief sought is damages for such breach. Appellant and the city in the *Griffin* case were in friendly relations, each assisting the other in maintaining the validity of the contract. In this case they are unfriendly, and antagonistic in all their contentions and issues. Under such circumstances, there could be no *res adjudicata* in the *Griffin* judgment. *Long v. Eisenbeis*, 21 Wash. 23, 56 Pac. 933; *Fogg v. Hoquiam*, 23 Wash. 340, 63 Pac. 234; *Brier v. Traders' Nat. Bank*, 24 Wash. 695, 64 Pac. 831.

The judgment is therefore affirmed.

RUDKIN, C. J., CHADWICK, CROW, and DUNBAR, JJ., concur.

[No. 9159. Department One. December 2, 1910.]

WILLIAM E. PROPS, *Respondent*, v. WASHINGTON PULLEY AND MANUFACTURING COMPANY, *Appellant*.[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGERS—NATURAL LAWS. A boiler maker of mature years and varied experience, who had done some firing, assumes the risks from a back fire or explosion in a furnace of a boiler which he was firing with sawdust and shavings for fuel, whereby a banked door was blown off, although he testified that he had never seen or heard of such an explosion; since it was due to simple, natural laws of which he was bound to take notice (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 3, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a boiler maker in a boiler explosion. Reversed.

[1]Reported in 111 Pac. 888.

Graves & Murphy (*M. M. Richardson*, of counsel), for appellant.

R. D. Hill and *Milo A. Root*, for respondent.

Gose, J.—The plaintiff, thirty-seven years of age, a boiler maker and a worker in structural iron and steel, was injured by a back fire or an explosion in the furnace of the boiler of the defendant's plant, on October 14, 1909. The day preceding the injury, he was engaged to take the place of the regular night watchman at the defendant's mill for a short time. The defendant was operating a plant for the manufacture of window sash, doors, etc. The plaintiff's duties were to watch the mill, and to have steam sufficient to operate the plant at the opening hour each morning. He had had about six years' experience as a boiler smith in the American naval service. During this time he had charge of the boilers. While engaged in that service, he fired at different times, when the regular fireman was ill, covering a period of about two weeks altogether. He had also fired about four months at another time, using coal as fuel in each instance. He had never used sawdust and shavings for fuel. On the night of the injury, he was firing with sawdust and shavings taken from the mill. The defendant had provided slabwood to be used with the sawdust and shavings. The negligence charged is that the plaintiff had never used such fuel, that the defendant knew that explosions were liable to occur from its use, and that it failed to warn him of the danger. There was a verdict and judgment for the plaintiff. The defendant has appealed.

In addition to the facts stated, the respondent testified that he had never seen or heard of such an explosion, and that he had no knowledge that a stove would blow out. The respondent banked the fire, closed the furnace door, and a few minutes later there was an explosion in the fire box, and the door was thrown open and fire and shavings thrown upon him. He testified that he had not changed the dampers to the furnace, but that he left them as the engineer had placed them. The engi-

neer who employed him knew that there had been back fires in the furnace, but did not instruct or warn him. The former explosions had been trivial, and had not injured any one. The respondent had lived for many years within a short distance of the appellant's plant, and had been a frequent visitor at the furnace room, in both the daytime and the nighttime.

The appellant insists, that the danger which caused the respondent's injury was not a hidden or latent one, but an obvious one springing from simple, natural, and universal laws, of which respondent was bound to take notice; that there was no duty upon the appellant to warn him of such laws; and that he assumed the risk incident to the employment. This view we think must be upheld. The rule as to the duty of the master to warn the servant is aptly stated in 1 Dressler's Employers' Liability, § 98, as follows:

"In the absence of anything to show the contrary, the latter has a right to assume that the servant knows those facts of common experience with which ordinary persons of his age and experience are familiar—such matters as are within common observation, and are according to natural law. He has also the right to assume that his servant will exercise reasonable care, under the circumstances, to inform and protect himself."

See, also, 1 Labatt, Master & Servant, § 241; 26 Cyc. 1168; *Wharton v. Tacoma Fir Door Co.*, 58 Wash. 124, 107 Pac. 1057. The contention that upon the facts stated the respondent assumed the risk, is supported by the following cases. *Nordstrom v. Spokane & Inland Empire R. Co.*, 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364; *Roessler etc. Chemical Co. v. Peterson*, 134 Fed. 789; *Bollington v. Louisville & N. R. Co.*, 30 Ky. Law 1260, 100 S. W. 850; *San Antonio Gas Co. v. Robertson*, 98 Tex. 503, 56 S. W. 323; *Johanson v. Webster Mfg. Co.*, 139 Wis. 181, 120 N. W. 832; *Fuller v. New York etc. R. Co.*, 175 Mass. 424, 56 N. E. 574.

In the *Nordstrom* case, the plaintiff, twenty-six years of age, was engaged in sawing steel lugs. While so occupied,

some of the particles of steel released in the process of sawing got into his eye. He was under treatment for some time, when it became necessary for his eye to be removed. It appeared that, before he received the injury, steel filings had been blown into the eyes of some of his fellow workmen, resulting in inflammation but not in the loss of an eye. In reaching the conclusion that the plaintiff assumed the risk, we said:

"It must be a matter of common knowledge to such a man that sawing iron lugs would create iron dust; that this iron dust would fly with the wind, or be thrown or forced by the movement of the saw; that flying dust would enter the eye if sufficiently near; that iron dust entering the eye might result in an injury the nature and extent of which, from the well-known delicate structure of the eye, no man could foresee."

In the *Roessler* case, the plaintiff, a man forty years of age and of varied experience, was injured by the explosion of lime while slacking it in the process of making whitewash. It was contended on the part of the plaintiff, that it was the duty of the master to instruct him as to the dangers attending the work. In holding that the court should have given a peremptory instruction for the defendant, it was said:

"We cannot, in the light of the evidence, regard whitewashing, and the slacking of lime as incident thereto, as outside the scope of the general employment of such a laborer as the plaintiff is proved to have been. He must, therefore, be considered to have assumed the risk incident to his employment. Whitewashing, and the slacking of lime for that purpose, is one of the commonest of domestic services. No special skill or training, and the slightest experience only, are required to perform it. That heat and steam are evolved in the slacking of lime, is almost as much a matter of common knowledge as that boiling water will produce steam, and it cannot be seriously contended that any special duty of protection is owing by the employer to a laborer of mature years and intelligence, who assumes, upon request, the work of slacking lime for the purpose of whitewashing. The employer, in this case, is not to be complained against for assuming that such

a man understands, as well as the employer, all that is necessary to be understood about the work he undertakes."

In the *Bollington* case a judgment was affirmed sustaining a demurrer to a complaint which alleged that the plaintiff, a boy nineteen years of age, was injured by an explosion while mixing lime and water, and that he did not know and had not been warned that it would explode. The court said that the explosion produced by the mixture of water and lime was but the result of a common and universal natural law, generally known, of which the plaintiff was required to take notice. In the *Robertson* case, the plaintiff, while painting a hot boiler with coal tar which he had been instructed to and had heated for the purpose, was injured by the popping of the tar. The court said:

"Such risk as there was is of the same nature as that which every cook using stoves and cooking utensils in connection with water or grease incurs. It was not greater than the farm-hand incurs in handling the simple tools with which he performs his labor."

In the *Johanson* case, an injury was sustained by the ignition of benzine which had been spilt upon the floor and about which the plaintiff was in the habit of working. She professed ignorancé as to the inflammability of benzine. The court said:

"In case of an adult of apparent usual intelligence, the employer may assume that she has the knowledge common to the great mass of mankind unless informed to the contrary, and in such case is not negligent in failing to specially instruct or warn."

The appellant was a man of mature years, of varied experience and a skilled boiler maker. His experience around boilers had been extensive. He cannot profess ignorance of simple, natural laws. Whether the occurrence be called an explosion, a back fire, or a blow out, it could have occurred only by smothering the fire with the fuel and closing the drafts. In this way the gas was accumulated in the

furnace, and when the pressure became strong enough, it would escape along the lines of least resistance. It is not claimed that there was any defect in the furnace itself. The respondent had used coal in firing. He knew that fine particles of coal would lie closer than coarse coal; that shavings or sawdust would lie closer than slabs or larger wood, and that gas, like steam, must be afforded some means of escape.

The respondent, among other cases from this court, cites *Currans v. Seattle & S. F. R. & Nav. Co.*, 34 Wash. 512, 76 Pac. 87; *Baker v. Duwamish Mill Co.*, 43 Wash. 149, 86 Pac. 167, and *Jancko v. West Coast Mfg. & Lum. Co.*, 34 Wash. 556, 76 Pac. 78. In the *Currans* case, the plaintiff was injured by the delayed explosion of a fuse in a coal mine. The negligence charged was that the company had used a double tape fuse when it should have used a triple tape fuse. After the lapse of about three-fourths of an hour, the fuse which plaintiff had lighted having failed to explode, he proceeded to examine it, and while bending over it, it exploded. It appeared from the evidence that explosions usually occurred in less than forty-five minutes. Upon these facts it was held to be a question for the jury whether he was guilty of contributory negligence. The case is readily distinguishable from the case at bar. It could not be said, as a matter of law, that he was guilty of negligence in approaching the fuse, when he had reason to believe that the fire had become extinguished. At least, reasonable minds might well differ as to whether his conduct was that of the ordinarily prudent man. In the *Baker* case, it was held to be the duty of the master to warn the servant of the existence of a hole in the floor of a mill where he was working which was unknown to him and which was concealed from view by the presence of sawdust. In the *Jancko* case, the plaintiff received an injury to his hand by the vibrations of the saw in a shingle mill. He testified that he did not know that the saw would vibrate. He told the foreman before he began working that he had never worked in a shingle mill. It was held that it was for

the jury to determine whether the warning given as to dangers surrounding him were sufficient. None of these cases, in our opinion, support the respondent's contention.

The judgment is reversed, with directions to dismiss the case.

RUDKIN, C. J., MOUNT, and PARKER, JJ., concur.

FULLERTON, J. (dissenting)—Under the facts shown, I think the question whether the respondent assumed the risk of injury from the explosive was for the jury. I therefore dissent from the judgment directed by the majority.

[No. 9119. Department Two. December 2, 1910.]

CHRARS CHRISTENSEN, *Respondent*, v. H. W. HAWLEY *et al.*, *Appellants*.[1]

MASTER AND SERVANT — NEGLIGENCE — SAFE PLACE — EVIDENCE — USUAL CONSTRUCTION. In an action for personal injuries sustained in the fall of a temporary trestle, put up for the purpose of filling up with dirt, and which collapsed during the process of construction because of the removal of stays, it is error to receive evidence as to the usual construction of trestles intended to be used as permanent structures.

EVIDENCE—EXPERTS—OPINIONS. Opinion evidence is inadmissible to prove negligent construction where twenty-five bents, fourteen to twenty-seven feet high, unsupported by braces, collapsed, when hauled from one end by a team on a block and tackle; since the matters were within common knowledge.

MASTER AND SERVANT—NEGLIGENCE—INSTRUCTIONS. Where twenty-five bents of a trestle fell when pulled on by a team, in raising a bent with a block and tackle, the instructions should not submit the question whether the structure was reasonably safe for the purpose for which it was intended but should submit whether it was strong enough and reasonably safe to hold the pulley on the block and tackle.

SAME—FELLOW SERVANTS. The negligence of a fellow servant is no defense where negligence on the part of the master is established.

[1]Reported in 111 Pac. 1061.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 11, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee engaged in the construction of a trestle. Reversed.

Bausman & Kelleher, for appellants.

Julius L. Baldwin, for respondent.

CHADWICK, J.—Appellants were engaged in building a temporary trestle. The trestle consisted of successive bents, with a cap across the top of each bent. Each bent was constructed on the ground, and as finished was raised in position, and secured to the bent immediately behind it by two stay planks laid across the bents and spiked to the cap. Each stay plank was spiked on top of the cap near the end. As the work progressed, stringers, four in number, were put on, reaching from one bent to the other, and securely fastened. When the stringers were put on, the stay planks were removed. It was the purpose of appellants to lay rails along the stringers for conveying dump cars, the object being to fill in so as to construct a bank for a reservoir. The trestle varied in height from fourteen to twenty-seven feet.

On the day of the accident, plaintiff went to work on the top of the trestle. He was directed to assist in putting on the stringers. Others were also engaged in removing the stay planks. During the progress of the work, some of the stay planks were removed before the stringers were fastened to the caps. Whether this was done by direction of the foreman, or by a fellow servant without, or in disobedience of, such direction, we are unable to say, for the testimony is in sharp conflict. During the forenoon no bents were raised, but in the afternoon that part of the work was resumed. The manner of doing this was to attach a block and tackle to the bent, carry it to the trestle, and with a team of horses, raise it in place, securing it with stay planks in the manner described. This being done in this instance, and the stay planks having

been removed at about the place plaintiff was at work, about three hundred feet (twenty-five bents) of the trestle collapsed under the strain. Plaintiff, falling with the trestle, sustained injuries which he now seeks to compensate in damages. From a verdict in favor of plaintiff, defendant has appealed.

The proximate cause of the injury is apparent, and although respondent's counsel discusses the question at some length, we think there can be no question that it was the removal of the stay planks before the stringers had been bolted down. The responsibility of appellants for this condition was the issue of fact to be tried by the jury, and we shall not discuss that question in the light of the errors assigned.

It is first contended that two witnesses were allowed to say how trestles were usually constructed. One said, by putting on stay braces as was done in this case, and also braces from one bent to the other on the side, and all spiked solid. The other witness testified that the top stays were usually braced from the mudsill of one bent to the top of another; that the bents should be cross-braced. The admission of this testimony was error for two reasons. The manner of building trestles to be used as permanent structures was not an issue before the court. The cause of the accident was the removal of the stays, which left the front of the trestle without support when the block and tackle was attached to it. Whether appellants were responsible for this condition was the only affirmative issue, and to fix a standard by describing a trestle intended as a permanent structure without reference to the contemplated use and temporary character of the one in question was to invite a comparison misleading to the jury and prejudicial to the appellants. The testimony was erroneously received for another reason. There was no call for opinion evidence. The jury was just as competent as the alleged experts to draw a deduction from the physical facts. That twenty-five bents, fourteen to twenty-seven feet high, standing unsupported, would likely fall if hauled from one end by a

team working a block and tackle, is within the common knowledge of men. *Johnson v. Caughren*, 55 Wash. 125, 104 Pac. 170; *Pantages v. Seattle Elec. Co.*, 55 Wash. 453, 104 Pac. 629.

The court gave an instruction to the jury based on the theory of a safe place to work, without such modifications as the circumstances of the case would require. This assignment will need no discussion except as may incidentally occur in the argument which follows. The court gave the following instruction:

"It was the positive duty of the defendants to so construct this trestle as to make it reasonably safe, considering the character of the work, and the character of the structure for the use to which it was wanted to be put, and the circumstances surrounding it there, for a workman to prosecute the work there. And if you should believe that Zulyvich disobeyed Dick Armstrong's instructions, respecting said planks, and the ones he should remove, and that because of his disobeying such instructions contributed to the injury; and if you also find that there was not sufficient other braces placed upon the trestle which an ordinary prudent builder would have put on, and that that was the proximate cause of the injury, then I instruct you that the defendant would be liable."

It seems evident that the instruction was grounded upon a wrong theory of the case. Whether the trestle was reasonably safe for the use to which it was intended to be put, was not the question for the court to try. It might not have been, and yet it may have been, perfectly safe for the use to which it was being put. The question is, not whether the trestle was so constructed that it would pass opinion as a permanent structure designed for heavy traffic, but whether it was, as constructed, strong enough to hold the fixed pulley on the block and tackle without falling when the front bent was raised. If the jury should find that, as designed and constructed, the trestle was safe for this purpose, then the inquiry should be whether Zulyvich, a fellow workman, was or-

dered by appellants' foreman to remove the stays, or whether he removed them without such orders. If the jury should find that the trestle as designed was safe to meet the purpose to which it was being put, the question of the negligence of a fellow servant would arise. But if it should find that it was not safe for that purpose, even though the stays had not been removed, the question of fellow servant would not occur, under the following authorities: *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, 58 Pac. 224; *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398; *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64; *Czarecki v. Seattle & S. F. R. & Nav. Co.*, 30 Wash. 288, 70 Pac. 750; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; *Conine v. Olympia Logging Co.*, 36 Wash. 345, 78 Pac. 932; *Ralph v. American Bridge Co.*, 30 Wash. 500, 70 Pac. 1098; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313.

The judgment of the lower court is reversed, and the case remanded for a new trial.

RUDKIN, C. J., MORRIS, and CROW, JJ., concur.

[No. 8770. Department Two. December 2, 1910.]

FRANCES R. BROWN *et al.*, *Respondents*, v. CHESTER THORNE, *Appellant*.[1]

TRIAL—VERDICTS—SPECIAL VERDICTS—INCONSISTENCY. In an action for injuries sustained through the fright of plaintiff's horse on the approach of an automobile, a general verdict is not inconsistent with special findings in that the latter did not determine the specific cause of the horse's fright; it being immaterial whether the noise, excessive speed, or sudden appearance was the cause.

HIGHWAYS—AUTOMOBILES—NEGLIGENCE—FAILING TO STOP. Negligence in failing to stop an automobile, upon signal by the driver of a horse that had taken fright, is sufficient to sustain a verdict for the plaintiff, even though the other grounds of negligence were not made out.

[1]Reported in 111 Pac. 1047.

SAME—NEGLIGENCE—NOISES. The right to operate an automobile carries the right to make the usual noises incident thereto.

SAME—NEGLIGENCE—FAILING TO STOP—PRESUMPTION. Where a horse has been excited and became unmanageable, it is the duty of the operator of an automobile to stop the machine, as it is presumed to be always under control.

SAME—NOTICE OF ROAD. The driver of an automobile must take notice of the road, and it is his duty to stop on signal, if he can without accident, when requested to do so by the driver of a horse not under control.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 20, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by the driver of a horse which was frightened by defendant's automobile. Affirmed.

Fred Llewellyn and *Hayden & Langhorne*, for appellant.

Anthony M. Arntson, for respondents.

CHADWICK, J.—On March 20, 1909, Frances R. Brown, one of the plaintiffs, and who will be hereafter referred to as "the plaintiff" in this case, had gotten into a buggy at a hitching post near Hall's store, East Fern Hill, in Pierce county. She was on what is known as Pacific avenue. Just as she got into the buggy, she saw an automobile, which proved to belong to the defendant, coming at right angles on what is known as the Wilson road. Hall's store faces Pacific avenue. The automobile, driven by defendant's chauffeur, swung around the corner and headed toward the plaintiff. Her horse, which had never before shown unusual alarm at an automobile, became nervous. She stood up in the buggy, and she says, and the whole evidence seems to show, that she signaled the automobile to stop. She says she also called out to the driver, though her testimony is unsupported in this respect. Seeing, as she says, that the automobile was not going to stop, she got out of the buggy, took the horse by the lines, and as the automobile went by, the horse lunged across the street, pulling her down, and so bruising and maiming her and tearing

the pelvic organs peculiar to women, that she was compelled to undergo an operation which resulted in their removal.

Plaintiff alleges several items of negligence—the excessive speed, cutting out the muffler within the limits of an incorporated town, loud, explosive, and puffing sounds, and having control of the automobile, failure to stop in obedience to plaintiff's signal and call, it being apparent that she did not have control of her horse. The defense was a general denial, and an affirmative defense that plaintiff had handled her horse in an extremely careless and incautious manner, it being of a nervous disposition which was known to plaintiff. The jury returned a verdict in favor of the plaintiff, in the sum of $2,500. Defendant has appealed.

It is insisted that the verdict is inconsistent with several special verdicts returned by the jury, and that the evidence is insufficient to support the verdict. The following interrogatories, among others, were answered by the jury:

"No. 1. Can you say and find, under your oath, what it was that caused Mrs. Brown's horse to become frightened? Answer: Noise, appearance and excessive speed of an automobile on the 'Wilson Road.'

"No. 2. Was it the appearance of the automobile; was it the noises made by the automobile; or what was it that caused Mrs. Brown's horse to become frightened? Answer: Yes. Yes. Sudden appearance as it came into sight at high speed along 'Wilson Road,' and disconnecting and connecting power at short intervals at the time car turned the corner and later.

"No. 3. Do you find from the evidence that the muffler on said machine was cut out and disconnected at the time of the accident? Answer: No evidence."

It is insisted that the verdict cannot stand, because the special verdicts leave the cause of the horse's fright uncertain; that it may have been induced by any one of a half dozen causes, leaving the true cause open to conjecture, speculation, and theory. It can make no difference in law whether the horse became frightened at the appearance of the car, or at the noises made by the car, or the sounding of the horn be-

fore the turn was made into Pacific avenue from the Wilson road. These are all mere details. The fact remains—and the jury have so found it to be—that the horse was frightened, and so far as the evidence shows, would not have been frightened but for the presence of the automobile. We cannot presume that courts and juries are possessed of sufficient "horse sense" to determine whether the horse was indifferent to the speed and observant of the noise, or careless of the noise and alert to the sudden appearance of the automobile around the corner of the store building. About the same contention was made and met in *Indiana Springs Co. v. Brown*, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238:

"Counsel for appellants argue that, since it is not shown by the complaint that defendant knew the cause of the fright of the plaintiff's horse, it fails to show negligence. Will any one seriously say that the driver of such an automobile, recently brought to the vicinity, may speed it at twenty miles an hour along the highway towards approaching harnessed horses, puffing and whirring so as to be heard several hundred yards away, and seeing a horse in front of him, hitched to a buggy, rearing, plunging and trying to bolt from the road without any other apparent cause, is justified in maintaining his speed because he does not know what it is that causes the horses fright?"

We find no inconsistency in the special verdicts.

It is further contended that there is no evidence to sustain the verdict. In discussing this feature of the case, appellant has discussed all of the charges of negligence save one; that is, the failure to observe the signal and call to stop. We have no hesitation in saying that the evidence was somewhat conflicting, that some of the charges of negligence were hardly made out, and that the jury would have been warranted in returning a verdict for the defendant. But where the complaint rests, not upon one, but several charges, it is enough that a case is made out on any one of them. That is to say, the case will not fail because one or more are not sustained by the evidence, so long as the evidence shows a sustained cause of action.

It is a rule of law that the right to operate an automobile carries with it the right to make the noises incident to its operation. *Eichman v. Buchheit*, 128 Wis. 385, 107 N. W. 325; *House v. Cramer*, 134 Iowa 374, 112 N. W. 3, 10 L. R. A. (N. S.) 655. But the rule without a proper limitation would be dangerous indeed, if not absolutely destructive of the rights of a driver of a vehicle drawn by horses. If the operator of a machine knows, or in the exercise of reasonable prudence ought to know, that his machine has excited a horse so as to make it unmanageable, it is his duty to stop the machine, for the presumption is that the machine is always under the control of its operator. *Shinkle v. McCullough*, 116 Ky. 960, 77 S. W. 196; *McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130; *Indiana Springs Co. v. Brown, supra*; *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. 196, 1 L. R. A. (N. S.) 215; *Ward v. Meredith*, 220 Ill. 66, 77 N. E. 118; *McCummins v. State*, 132 Wis. 236, 112 N. W. 25; Berry, Law of Automobiles, § 126; Huddy, Automobiles, ch. 11.

It is a further rule that a driver of a machine must take notice of the road. *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632; *Lampe v. Jacobsen*, 46 Wash. 533, 90 Pac. 654; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 125 Am. St. 915. And further that, if a driver is requested by signal or otherwise to stop, he shall not go further, unless such movement is necessary to avoid accident or injury, or unless the animal is under the control of its rider or driver. These rules have been recognized and written into the statutes of this state. Rem. & Bal. Code, § 5570. The court submitted the question of defendant's negligence upon the charge of failing to observe and act upon the signal and call, as well as the right of the defendant to use his judgment as to stopping immediately or passing beyond the horse before halting. This being enough to sustain the verdict, it is unnecessary to discuss the other charges of negligence.

The jury found for plaintiff upon the issues of fact, and finding no error in law, the judgment is affirmed.

RUDKIN, C. J., CROW, DUNBAR, and MORRIS, JJ., concur.

[No. 8971. Department Two. December 2, 1910.]

H. G. MANVELL, *Respondent*, v. W. H. WEAVER, *Appellant*.[1]

APPEAL—DECISION—LAW OF CASE. Upon a retrial, the decision on a former appeal becomes the law of the case, and is conclusive.

APPEAL—REVIEW—HARMLESS ERROR—VERDICT. Where the jury returns the only verdict that could have been rendered under the evidence, intermediate errors as to the form of the action or error in instructions are harmless.

SAME—INSTRUCTIONS. Errors in submitting instructions as to the measure of damages on a certain item is harmless where it appears from the verdict of the jury that such item did not figure in the verdict.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 19, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Aust & Terhune, for appellant.

M. E. Sheldon and *Keenan & Hardinger*, for respondent.

DUNBAR, J.—For some time prior to the 25th day of February, 1907, appellant was the owner of and conducting a restaurant in the basement of the Arcade building, in the city of Seattle. This restaurant fronted upon Arcade court. Opposite this restaurant, and across the court, was then under course of construction a building known as the Arcade Annex. Both of these buildings were controlled by the Moore Invest-

[1]Reported in 111 Pac. 890.

ment Company. On said day, appellant and respondent entered into a written agreement, as follows:

"Seattle, Wash., Feb. 25, 1907.

"This is to certify that Latsch & Barth, acting as agents for both buyer and seller, have this day received from H. G. Manvell, the sum of two hundred dollars ($200) as deposit to apply on purchase price of that certain restaurant situated in the basement of the Arcade building, Seattle, Wash.

"The purchase price of said place to be two thousand dollars cash, payable as follows:

"This two hundred dollars ($200) cash in hand and balance of eighteen hundred dollars ($1,800) on or before March 2nd, 1907, at which time the owner, Mr. Weaver, shall furnish H. G. Manvell with a clear bill of sale and an affidavit that all furniture, fixtures, dishes, kitchen equipment, stock and everything contained in said restaurant shall be absolutely free of all incumbrances.

"It is further understood that Mr. Weaver is to deliver a lease or cause same to be delivered upon that certain vacant store room now being completed in the Arcade Annex, together with the basement thereto, which shall be for a period of not less than three (3) years, and at a monthly rental of three hundred dollars ($300).

"Said location to be substantially as follows: The main store room facing First Ave. and directly opposite present Arcade Lunch, and on street level to be 20x100 ft., also a basement under rear of said store room and size approximately 50x60 ft.

"It is further understood that kitchen partition and provision for dumb-waiter shafts, together with all necessary plumbing, sewer connections, piping and wiring, shall be done by the landlord without any expense to said H. G. Manvell whatever.

"It is further understood that if said Mr. Weaver is unable to deliver or cause to be delivered the lease as specified above this contract shall be null and void and all deposit money returned to said H. G. Manvell, without any expense to him whatever.

"It is agreed by Mrs. M. Manvell, representing H. G. Manvell, that she agrees to complete purchase in the manner and upon the terms herein specified and that in case of her failure

to do so, the said sum of money hereby receipted for shall be forfeited as liquidated damages.

"It is further agreed that in event of failure to convey good and sufficient bill of sale on said restaurant on or before March 2nd, the said deposit of two hundred dollars ($200) shall be refunded Latsch & Barth, By L. M. Latsch.

"I hereby agree to all the provisions of the above contract. H. G. Manvell, By Mrs. M. Manvell.
"W. H. Weaver.

"Dated Seattle, Washington, Feb. 25, 1907."

On the 4th day of May following, the parties met, respondent paid to appellant the remaining $1,800, received a bill of sale of the restaurant fixtures, and accepted from the Moore Investment Company a lease in accordance with the terms of the agreement between appellant and respondent; but the beginning of the respondent's tenancy under appellant's lease was left blank therein, to be later filled in on completion of the building. Deeming that the provisions of the agreement had not been complied with in relation to some of its provisions, especially the provision with relation to the supplying of dumb waiter shafts and necessary plumbing and sewage connections, piping, and wiring, this action was brought by the respondent against the appellant, alleging violation of the provision of the contract.

The defendant, answering that portion of the complaint, admitted the execution of the contract set out, but denied responsibility for the furnishing of the plumbing, etc., and alleged, in substance, that the transactions between the appellant and respondent were ended when the respondent paid the balance due on the contract price and received his lease from the Moore Investment Company. While many allegations and denials are made in the complaint and answer, this is really the material question in the case. Plaintiff alleges that, upon the failure of the defendant to comply with the conditions of the contract, he tendered and offered to return all of said personal property by him received from the defendant, and also to deliver to defendant complete possession of the

said restaurant; and duly demanded of the defendant that he pay to him the said sum of $2,000, which the defendant neglected and refused, and still neglects and refuses, to do. This offer to rescind is admitted by the defendant in his answer, and he affirmatively alleges that he refused the plaintiff's offer in that respect. The plaintiff set forth several items for which he demanded compensation in the way of damages, and the expenditure of certain moneys amounting to $400, and alleged, that the value of the occupancy under the lease would have been $7,500; and that the true and proportionate consideration, paid by the defendant to plaintiff for said restaurant and lease and the assignment thereof, was $1,615, the expressed valuation being $2,000 and it being admitted that the plaintiff obtained $385 for the personal property belonging to the restaurant, leaving a balance of $1,115 on that item. Upon the trial of the cause, certain testimony was offered tending to explain or construe the language of the contract. This testimony was rejected, and the trial resulted in a nonsuit against respondent; whereupon he prosecuted an appeal to this court. The decision is reported in 53 Wash. 408, 102 Pac. 36, where is set forth an extended statement of the case, to which we refer, and which precludes the necessity of a further statement in this opinion.

It seems to us that that opinion settles many of the questions that are discussed on this appeal. There this contract was construed, as was also the complaint in this case. It was held that the written agreement was sufficiently ambiguous to call for the evidence offered, for the purpose of explaining its uncertainties and disclosing the exact agreement of the parties; and the case was for that reason sent back. Upon a retrial, a verdict was rendered in favor of the respondent for the sum of $1,615 which represented the balance of the purchase price paid for the old restaurant. As to the character of this action, it was said in the former opinion:

"Thereupon the plaintiff, who contended that the defendant had violated his contract of sale in failing to procure a lease

which carried such equipment with it, elected to cancel the contract and lease, and commenced this action to recover the purchase price paid by him, and other damages."

It was also said in that case:

"The vital question to be determined in this action was whether the lessor or lessee was to sustain the expense of installing the necessary equipment for ventilating purposes. Was the burden to rest upon the appellant, or did the respondent agree to procure a lease releasing him from any such burden?"

Indeed, the appellant admits, during the course of the trial and by the defense offered, that this was the vital question in the case. This being true, the only question involved here is, is the verdict sustained by the evidence. From a perusal of the testimony, we are satisfied that it is fully sustained. In fact, we hardly see how the jury could have come to any other conclusion than the one reached, under the testimony offered. Therefore, the questions that are discussed in relation to the form of the action, the alleged errors of the court in instructions, etc., are not material; for when it is apparent that the jury have returned the only verdict which could have properly been determined in the case, intermediate errors become immaterial. In addition to this, all the alleged errors of the court in its instructions in relation to the value of the leasehold interest which was sued for, viz., $7,500, become immaterial, for the reason that it is plain from the verdict that no value whatever was considered by the jury, and that the respondent was simply awarded the purchase price, viz., the difference between $2,000 which he had paid and the $385 which he confessed to have received from the personal property he had disposed of. The other item claimed—the $400—was taken from the consideration of the jury by the instruction of the court. Hence, the instructions of the court in relation to the measure of damages, even if they had been erroneous, would not be material.

Finding no errors whatever in the trial of the cause, the judgment will be affirmed.

RUDKIN, C. J., CHADWICK, MORRIS, and CROW, JJ., concur.

[No. 9007. Department Two. December 2, 1910.]

I. B. MERRILL, *Respondent*, v. JOHN B. STEVENS & COMPANY, *Appellant*.[1]

APPEAL—REVIEW—VERDICT. The verdict of a jury upon conflicting testimony is conclusive on appeal.

EVIDENCE—ABSENT WITNESSES—EXCUSE FOR FAILURE TO PRODUCE—MATERIALITY. It is not error to exclude explanation of the absence of a witness, where no showing was made as to the materiality of his testimony or of the relation in which he stood to the parties.

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse an instruction sufficiently covered in the general charge.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered February 10, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee while unloading a car of grain. Affirmed.

Hudson & Holt, for appellant.

Fitch & Jacobs, for respondent.

DUNBAR, J.—At the time of the injury to respondent, appellant was conducting a warehouse in Tacoma, which had a platform from three to four feet in height above the ground, extending to within a few feet of the railroad track of the Northern Pacific Railway Company; and at that time was unloading a carload of oats in bulk from the car, and putting it into the warehouse. When the grain was loaded into the cars, a false door was placed on the inside of the facing of the real door. In order to empty the car, a hole was cut in the false

[1]Reported in 112 Pac. 353.

door, at or near the bottom of it. Through this hole the grain passed into a hopper, from which it was conveyed by a mechanical process into the warehouse. When the car was placed at the proper location, so that the middle of the door was in a line with the middle of the hopper, the hopper would be lowered, and the hole would be cut in the door by some one who sat or stood on the hopper itself and bored holes with an auger until the opening was made. The hopper was planked up, and the respondent claims that he was hurt by the breaking of a plank or board which was nailed to the hopper, and upon which he stepped in the performance of his duty.

The allegations of the complaint in this regard are, in substance, that the plaintiff was in the employ of the defendant on or about July 19, 1909, and had been ordered by the foreman in charge to assist in unloading a car of loose grain, which was to be done by means of the hopper of which we have spoken, and screw elevators, and appliances furnished by the appellant for said purpose; that while he was engaged in said work, he was ordered to shut off the supply of grain coming from the car; that this was done by closing this door; that in obeying such order, he moved the lever, shutting off the supply of grain from the hopper to the screw; that it then became necessary for him to shut off the supply of grain to the hopper, and in order to do so, it was necessary for him to reach the car, and the only means provided for doing so was by stepping upon the framework of said hopper; that as he stepped upon the framework of the hopper for said purpose, the same broke, precipitating him to the ground, and he was thereby injured; that the framework broke by reason of its being negligently and insecurely fastened and nailed, and by reason of its being inadequately constructed for the purpose for which it was used; that the manner in which he stepped upon the framework was that usually adopted by the employees of said defendant for such purpose, and was the only way provided whereby said grain could be shut off; that the plaintiff was using due care; that the framework of said

hopper upon which plaintiff was required to step consisted of a board, of about one inch thick and twelve inches wide, nailed in a horizontal position on the frame of said hopper, secured by about four nails, one in either end near the lower edge of the board, and one in either end near the middle of the board; that the upper part of the board was not nailed or secured in any way, and as he stepped upon said frame for the said purpose, said board split at about the point where it was nailed near the center of its width, and threw plaintiff's feet outward and toward the left, throwing him across the remaining part of the hopper frame.

The answer admitted the employment, but denied any negligence in the construction of the hopper, or that plaintiff was injured in the manner described in the complaint; alleged that, if there were any dangers in the performance of the work, they were open, notorious, obvious, and well known to the defendant, or that in the exercise of ordinary prudence and care they should have been known to him; that there was a safe way in which he might have performed the work in which he was then engaged, as well as an unsafe way; and that, with the knowledge of both ways, he voluntarily elected to perform the work in the unsafe way. The case was tried by a jury, and a verdict rendered in favor of the plaintiff. Motion for a new trial was made and denied, and judgment followed.

The principal contention in the argument and briefs of counsel for appellant is that the court erred in denying appellant's motion for judgment, both at the conclusion of respondent's testimony and at the conclusion of all of the testimony in the case. The manner in which the respondent received the injuries complained of, or the manner in which he was performing the work at the time of his precipitation from the frame of the hopper, was a question which was very strongly contested; it being contended by the appellant and many of his witnesses that the respondent, in passing across the space, had one foot on the platform and the other on the

doorsill, that it was not necessary for him to step upon the frame of the hopper, and that he did not do so as a matter of fact. Special interrogatories were propounded to the jury on this question, the first being: "Do you find that he fell while he had one foot on the platform and the other on the doorsill of the car?" Second: "Do you find that he fell by reason of one of the boards of the framework of the hopper breaking?" The jury answered the first interrogatory "No," and the second "Yes." This renders unnecessary a discussion of these propositions. The other question of fact, viz., the manner in which this work could most safely and practicably be done, was also submitted to the jury and decided against appellant's contention.

It is claimed that the court erred in excluding the testimony of John B. Stevens, a member of the defendant corporation. When asked what effort, if any, he had made to find one John Vusard, this question was objected to by the court, and is alleged as error on the theory that, where it is within the power of a party to produce evidence material to the controversy, and he does not do so, his failure to do so may be construed against him; that this applies particularly to those cases where the witness was in the employ of the party. Appellant cites 9 Enc. Ev., pp. 966-7-8, to sustain this contention. The rule is there laid down that evidence explaining the absence of a material witness is admissible when the failure to produce him would warrant an unfavorable inference; and there is no doubt of the soundness of that rule when it is applied to a proper case. The cases that are cited by the author to sustain this text, viz.: *Brown v. Barse*, 10 App. Div. 444, 42 N. Y. Supp. 306, and *Hall v. City of Austin*, 73 Minn. 134, 75 N. W. 1121, lend no support to the contention in this case. In the first case, the defendant was not present at the trial. The plaintiff testified to personal transactions with him, which the defendant would naturally have taken the stand to deny if the defense which he had pleaded was true. The court said that, in his absence, his counsel had a right

to prove any fact the effect of which was to excuse his failure to attend and give evidence in his own behalf, because the nonattendance of an absent defendant who had a personal knowledge of the facts, if any, which constituted his defense, and his failure to testify, might properly be considered by the jury as bearing upon the strength of his case. In the second, the plaintiff, although in feeble health, appeared in court and testified as a witness in her own behalf in her case in chief. In its defense the city introduced evidence as to certain statements alleged to have been made by her, and it was said that, if she had an opportunity to deny these statements and failed to do so, that fact would naturally be quite prejudicial to the whole case, and under the circumstances it was competent to prove that she was sick in bed and too ill to appear and testify in rebuttal. Many other cases may be found sustaining the same doctrine under various circumstances.

But in this case there was nothing to indicate that John Vusard had any special knowledge of the matters in controversy. The question did not even indicate that he had been present at the time of the accident, although it might appear in some other stage of the proceedings; or that he was in the employ of the appellant; or that, if he had been, how long a time it had been since the employment ceased. All that occurred was this:

"Q. State to the jury what effort, if any, you have made to find one John Vusard who was said to have been present at the time of this accident. The Court: I do not see how that is material. Mr. Holt: If you rule it out I would like to save an exception. That is all. The Court: I rule it out and you may have an exception."

No statement was made to the court, showing or claiming to show the relation in which Vusard stood to the witness, and no showing as to what the witness expected that Vusard would testify to if he were present. We think that, so far as the record shows, the court was right in holding that the question was immaterial.

The appellant asked the court to instruct the jury as follows:

"You are instructed, gentlemen of the jury, that even if you should believe from a fair preponderance of the evidence that the framework of the hopper broke when the plaintiff stepped on it, yet if you further believe that on account of the manner in which the framework was constructed, it was dangerous to step on it, and that the plaintiff knew that it was dangerous, or in the exercise of ordinary care for his safety should have known and that there was a safe way or ways in which the plaintiff might have performed his work, known to him, then you will find the verdict for the defendant, for the reason that the plaintiff in such case would be guilty of negligence himself, and the defendant cannot be held responsible for the plaintiff's own negligent choice of the manner in which he performed his work."

This instruction was refused, and the refusal is assigned as error. There is probably no objection to this instruction, if the substance of it was not given by the court on its own motion. The court, after instructing the jury on the general propositions involved in cases of this kind, guarding, we think, with care the rights of the appellant in every particular, proceeded as follows:

"Where there are two methods by which an employee can do work and both are equally available, convenient and speedy, and one is safe and the other unsafe, and the employee of his own volition chooses the unsafe method and is injured, he is in law held to be guilty of contributory negligence. Where there are two methods of work, one safer than the other, and the methods are not equally available, convenient and speedy, it is for the jury to say whether the employee in choosing the less safe method was guilty of contributory negligence, and in determining this question you are to consider whether a person of ordinary prudence would or would not have acted as the employee acted."

The court further instructed the jury:

"The negligence alleged in plaintiff's complaint is that a plank on the side of the hopper frame was insecurely and im-

properly nailed. The way to determine whether any person has been negligent or not is to compare what was done by such person, or left undone by such person, with what would have been done or left undone by a person acting with ordinary prudence. If a man acts as an ordinarily prudent man would act under the same circumstances and conditions, there is no negligence. If a man fails to act as an ordinarily prudent man would under the same circumstances and conditions, there is negligence."

It is contended by appellant that the instruction first quoted fails to state the law applicable to a case where one method was safe and the other was unsafe, but the unsafe one was more convenient than the safe one, and where the unsafe one was more convenient than the safe one and was selected by the sevant. But we think the objections to all these instructions are hypercritical, and that the jury were not misled by any fine distinctions which might possibly be discovered by a very logical and astute mind and one skilled in detecting distinctions in language. This remark applies also to the criticism on the last instruction which we have quoted, where an objection is made that the word "ordinarily" is misplaced, and the court, instead of using the words "acting with prudence," uses the language, "a person of ordinary prudence." It is claimed that these instructions to the jury gave them their choice of tests, viz., a test of a person acting with ordinary prudence; the test of the conduct of an ordinarily prudent person acting in manner not stated; and the test of a person of ordinary prudence acting in some manner not defined. We think that these objections are too refined to have any practical weight. The instructions as a whole, it seems to us, squarely place the issues, the duty of the servant and the duty of the master, respectively, before the jury, and that the verdict was rendered under instructions which were in no way prejudicial to the appellant.

There being no error discoverable, the judgment will be affirmed.

RUDKIN, C. J., CHADWICK, and CROW, JJ., concur.

[No. 9027. Department Two. December 2, 1910.]

WILLIAM BERGER, *Respondent*, v. METROPOLITAN PRESS PRINTING COMPANY, *Appellant*.[1]

APPEAL—DECISION—LAW OF CASE. The decision of the supreme court on a former appeal becomes the law of the case.

APPEAL—REVIEW—VERDICT. A verdict upon conflicting evidence, sustained by the respondent's testimony, will not be reversed on appeal.

MASTER AND SERVANT—NEGLIGENCE—VICE PRINCIPAL—PERSON IN AUTHORITY. Where an employee in a printing shop was ordered by the foreman to work under the directions of a pressman, the latter was a vice principal when he called upon the former to help put a belt upon a pulley.

MASTER AND SERVANT—SAFE APPLIANCES—FACTORY ACT—APPLICATION. The factory act, Rem. & Bal. Code, § 6537, requiring belt shifters in a factory, mill, or workshop where machinery is used, applies to a main power shaft in a printing shop.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 22, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a printing shop. Affirmed.

Kerr & McCord, for appellant.

Fouts & Gould (*Milo A. Root*, of counsel), for respondent.

DUNBAR, J.—This is an action for damages for the loss of an arm. The arm was torn off by the appellant's printing plant, while respondent was attempting to assist one Carter to put on a belt which had worked off of a pulley attached to a certain shaft. This case has previously been before this court, and is reported in 55 Wash. 422, 104 Pac. 617, to which reference is made as a part of the history of the case. In that trial, at the close of the plaintiff's testimony, a motion for a nonsuit was sustained. The judgment

[1]Reported in 111 Pac. 872.

of the lower court was reversed and the cause remanded for trial. Upon re-trial, judgment was rendered in favor of plaintiff, from which judgment this appeal is taken.

It was determined on the former appeal, and so expressed in the opinion, that the notice of injury was sufficient, and that there was sufficient proof of negligence to pass to the consideration of the jury, and these determinations went to the lower court as the law of the case. A comparison of the evidence offered at the prior trial with the evidence submitted at this trial convinces us that there was, at least as great a weight of testimony submitted by the respondent at the last trial as there was at the first one. Of course, we have reference to the testimony submitted by the respondent, for at the first trial no testimony was offered by the appellant, and the case here will have to be determined upon the testimony of the respondent; that is to say, if sufficient legal testimony was offered by the respondent to sustain his contention, the fact that it was disputed by the appellant would not justify a reversal of the judgment.

But even examining the testimony in this case as an original investigation, we are still of the opinion that the respondent's testimony was sufficient to show negligence on the part of the appellant, and that it cannot be said that the testimony as a whole shows contributory negligence on the part of the respondent as a matter of law. If learned counsel's statement of what the record shows could be received as the uncontradicted testimony in the case, his argument would be irresistible; for it is evident that, if respondent, with another fellow servant and without authorization, went outside of the scope of his employment and duty and got hurt, he could not recover. But the testimony of the respondent is that he was ordered by Moore, the foreman, to return to the shop that evening and help Carter; that he did so; that Carter called upon him to help put the belt on, and that in so doing he was injured. The foreman also testified that respondent, in addition to being pressman, was general helper. So that, on

this question there was a conflict of testimony. Under the uniform rulings of this court such questions, having been determined by another tribunal, are eliminated from our consideration; and conceding, as we must for the purposes of this appeal, that the respondent was working under Carter's direction by instruction of the foreman, Carter was, for the purpose of that particular employment, a vice principal of the appellant, and not a fellow servant of respondent. *Johnson v. Motor Shingle Co.*, 50 Wash. 154, 96 Pac. 962.

On the question of contributory negligence, the necessity and practicability of a belt shifter, and all the other material questions in the case, the testimony was contradictory, and the weight of the same was settled by the jury. Looking at the instructions of the court as a whole, we think the rights of the appellant were protected in every particular, and that the instructions asked for, so far as they stated the law, had in substance been given by the court. No prejudicial error is discovered in the admission or rejection of testimony.

The contention that the provisions of the factory act do not apply to belting on a main power shaft is forcibly answered by the language of the statute. Section 1, of the Laws of 1905, page 164, provides:

"That any person, firm, corporation or association operating a factory, mill or workshop where machinery is used shall provide and maintain in use, belt shifters or other mechanical contrivances for the purpose of throwing on or off belts or pulleys while running, where the same are practicable with due regard to the nature and purpose of said belts and the dangers to employees therefrom," etc.

And this section, while amended in some particulars, is still the law of the state in the particulars under discussion [Rem. & Bal. Code, § 6587].

The judgment is affirmed.

RUDKIN, C. J., CROW, and MORRIS, JJ., concur.

[No. 8973. Department Two. December 3, 1910.]

OLIVER C. McGILVRA, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

STREET RAILROADS—FRANCHISES—RIGHTS—MOTIVE POWER. A franchise for various street car routes authorizing the company to propel their cars either by electricity or cable, empowers the company to make a change and employ both on a single route, especially where that has been the contemporaneous construction of the city council.

SAME—OPERATION—MOTIVE POWER—CONTROL—REVIEW BY COURTS. The expediency and propriety of allowing a change of motive power on a street car route, thereby preventing continuous passage and requiring transfers, is for the determination of the board of public works, and the courts will not interfere with the deliberate judgment except for abuse of discretion.

SAME—OBJECTIONS TO CHANGE. Objection to a change of motive power on a street car route on the ground that the service will be inefficient is unavailing, since the authorities can compel an efficient service.

SAME—SERVICE—TRANSFERS—CONTINUOUS PASSAGE—CHANGE. A street car company may, with the approval of the city, change from a through service to a transfer service, although it may cause some inconvenience.

SAME—FRANCHISES—CONSTRUCTION. A clause in a franchise expressly restricted to existing street railways that may be acquired and used as a part of the system has no application to any part of the old system.

SAME—SERVICE—CHANGE IN ROUTES—TRANSFERS. Where a street car franchise requires the issuance of transfers from one line to another, the matter is within the control of the city, and the courts will not interfere with proposed changes in routes and service in anticipation of a breach of the contract of the company respecting transfers.

SAME—CONTROL—REVIEW BY COURTS—INJUNCTION. Where the determination of engineering problems respecting a street railway route has been vested in and decided by a board of public works, the courts will not, upon conflicting evidence by affidavits, interfere by injunction to set aside the decision.

[1]Reported in 111 Pac. 896.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 4, 1910, in favor of the plaintiff, granting an injunction against a proposed change in the operation of street cars. Reversed.

James B. Howe and *R. G. Sharpe*, for appellant.

James Kiefer and *Hughes, McMicken, Dovell & Ramsey*, for respondent.

CHADWICK, J.—Defendant is the owner of the street railway lines in the city of Seattle. Since 1890, a line of street railway has been maintained on Madison street, from Western avenue to Laurelshade, near Lake Washington. This line is about three and one-half miles long, and runs from the downtown district to or near Lake Washington. Madison street is one of the main street-car thoroughfares in the city. This line, under more recent contracts with the city, has passed under the control of the defendant. It is divided into two parts, route 10 covering that portion of Madison street from 100 feet west of the west line of Western avenue to Twenty-first avenue, and route 11 covering that portion of Madison street from Twenty-first avenue to Laurelshade. Each route is operated by a separate cable, although the cars are run through from one terminus to the other, excepting that at certain times of the day when traffic is heavy, extra cars are run from Western avenue to Twenty-first avenue.

Defendant is desirous of electrifying a part of its Madison street line, and to that end has received permission from the board of public works to put on electric cars from Broadway to Laurelshade, the plan being to run electric cars to Broadway, thence on Broadway to Tenth, where a transfer may be made to the James street cable, or the passenger may transfer at Broadway to the Madison street cable, making the through trip as before, with the added inconvenience of transferring from one car to another. The defendant further plans to divert a number of its cars at Fourteenth avenue, thence north

to Pike, thence down Pike to First avenue. Under the proposed plan, the patrons on Madison street beyond Broadway might reach the city by any one of the three routes. Plaintiff brought this action, asking for an injunction against defendant.

He sets up the ownership of property on Madison street beyond Fourteenth avenue; that the new plan will put an unwarranted inconvenience upon the people and unreasonably delay traffic; that a present schedule of twenty-three minutes from terminus to terminus is now maintained, whereas under the proposed plan the electric cars, switched at Fourteenth by way of Pike, will take about fifty or fifty-five minutes to go from terminus to terminus. He further alleges the impracticability of the scheme, in that the grades from Twenty-second avenue to Twenty-ninth avenue are so heavy that a sufficient number of electric cars to sustain the traffic cannot be run over that part of the route without great danger and hazard to human life. He also claims consequential damages to his property. From a decree granting a temporary injunction, defendant has appealed.

The franchise under which appellant is operating provides that the grantees, and their successors and assigns, may propel their cars either by electricity or cable traction, or partly by each. Other provisions of the franchise pertinent to our inquiry are as follows:

"The grantees, their successors and assigns, may establish and take a passenger toll or fare which shall not exceed the sum of five cents for a single continuous ride one way over any line or lines owned or controlled by the grantees, their successors or assigns, between points situated within the city limits or points on either of the extensions mentioned in section 13 hereof (when constructed or acquired), although a transfer or transfers shall be necessary, but no such transfer shall be good except upon the first connecting car at the point of transfer. . . . The grantees, their successors and assigns, shall have the right at any and all times to make reasonable rules and regulations for the management and operation of the railway lines herein provided for; provided,

that such rules or regulations shall not conflict with the laws of the state of Washington and the charter and ordinances of the city of Seattle. . . . That the said grantees, their successors or assigns, shall have the right to make such reasonable rules and regulations as to the government and operation of said road and the management and operation of their property as are not in conflict with the laws of the state of Washington or the charter and ordinances of the city of Seattle. . . . The grantees, their successors and assigns, shall keep on sale for $1 each at their main office and power stations within the city, commutation tickets entitling the purchaser to twenty-five rides. Such tickets shall not be transferable or entitle the owner to a transfer and the company may make such reasonable regulations in regard to the issue and use of the same as to enforce these provisions. . . . In case any existing railway is acquired and used as a part of the system hereby authorized, the operation of so much thereof as is embraced in any of the routes hereinbefore described shall be continued with only so much interruption as is actually necessary to make the same conform with the provisions of this ordinance."

We think that, under the terms of the franchise, there could be no question of the right of the appellant to electrify either route 10 or route 11, and compel a transfer of passengers at Twenty-first avenue, that being the point where the two routes come together, and the cars pass from one cable to the other; unless it be, as contended, that only one kind of motive power can be used upon the Madison street line. While the terms of the grant are probably sufficiently broad to permit the company to use either a cable or electricity or both upon a single route, our attention is directed to the fact that the city has, since the grant in question, granted many franchises for single routes each of which contains a like provision; so that, if the terms of the contract were doubtful, it would be the duty of the court, in the absence of some controlling rule of law, to follow the rule of cotemporaneous construction by the legislative body.

The case is therefore reduced to the proposition that, having a right to compel a transfer at Twenty-first avenue, can

the company compel a transfer at Broadway and make its electric connecting line continuous from that point to Laurelshade; passing, as it will, over the connecting points of routes 10 and 11. The power to pass upon the expediency of the proposed plan is vested by law in the board of public works. It has granted the necessary permission, and the council has refused to interfere with its discretion. Manifestly the courts cannot, in the absence of a showing of positive abuse, interfere to thwart the deliberate judgment of the local authorities. The parties to the contract have agreed not only upon its terms, but also upon its construction; and it is too well settled to require any citation of authority that mere inconvenience will not warrant a court in usurping the rights of a municipal corporation to pass upon all questions of expediency and propriety within the limits of its jurisdiction. A change in motive power, under a franchise giving an option between steam and horse power, was passed upon by the supreme court of Illinois. It said:

"The power given by the charter was to operate the road to be constructed, with 'horse power or locomotive cars.' We read this as giving an option to the company to use either animal power or steam power, or both, upon their road, or any part of it; that this was a continuing option, which might be exercised from time to time; that after the use for a time, of either kind of power, the other kind might be substituted, as the company saw fit." *McCartney v. Chicago & Evanston R. Co.*, 112 Ill. 611.

But counsel insists that the patron has a right of continuous passage that cannot be taken away. That such changes as are contemplated may cause some inconvenience may be admitted, but the right to make them, when approved by the city, has not been questioned in the few cases we have been directed to, or have been able to find. The right of continuous passage without transfer was asserted in *People ex rel. Linton v. Brooklyn Heights R. Co.*, 69 App. Div. 549, 75 N. Y. Supp. 202. The court refused to compel the maintenance of a through service, although unhampered, as we are in

this case, by the express sanction of the controlling legislative body. The latest expression of the courts is to be found in *Heidegger v. Metropolitan St. R. Co.* (Mo. App.), 126 S. W. 990:

"The grounds upon which petitioners seek the aid of an injunction are alleged as follows: 'Plaintiffs further state that they and each of them and other persons, as aforesaid, using said Vine Street car line have frequent and divers occasion to use the same as a continuous operated line of street railroad, and the fact that the same is and has been a continuous line of street railroad is of great advantage and benefit to their said properties, and of material financial value thereto, and that the cessation of the operation of said street car line as a continuous line upon which cars are operated from and between present termini will cause great and irreparable injury to the plaintiffs, and greatly depreciate the value and injure their said properties and render the same of materially less value and worth than the same now are. Plaintiffs further state that the said defendant intends and threatens as aforesaid to cease the operation of its cars on said Vine Street line of railroad as a continuous and through operated car line, and that the said act of the defendant so threatened and intended to be carried out will be in violation of, and contrary to, its said franchises and rights, in that it will be a diversion of said continuous car line into two lines of street railroad, instead of one continuous line as the same now is; that is to say, said street railroad will be one line from the north, having a terminus at Thirty-First street and Woodland avenue, and another line from the south, having a terminus at or about Forty-Fourth street, and running by way of Woodland avenue to Thirty-First street, and thence west on Thirty-First to Holmes street, and thence north into the downtown district of the city, and plaintiffs allege and state that the said operation of said street car railroad will not be the operation of the same as one continuous and uninterrupted line for the continuous passage and operation of cars without necessity of change from car to car by the passengers.' . . . Under the franchise the company is bound to render efficient service, and if they fail to do so, the city can compel it to properly comply with its duty in that respect. But whether the service on the line will depreciate in efficiency is purely problematical, . . . and we do not think that the proposed

re-routing would have the effect of breaking the continuity of the Vine Street line. It is true that there would have to be a change of cars at Thirty-First street, but the line would be continuous with the payment of a single fare. The mere fact of a change of cars would not prevent the line from being a continuous one. It would operate at most to an inconvenience which residents of the city are likely to encounter in traveling from one part of the city to another."

To the effect that a railway company can, unless prevented by contract, make schedules, create rules, and prescribe transfer points, see: *Dryden v. St. Louis Transit Co.*, 120 Mo. App. 424, 96 S. W. 1044; *Central of Georgia R. Co. v. Ashley*, 159 Ala. 145, 48 South. 981; *Kelley v. New York City R. Co.*, 192 N. Y. 97, 84 N. E. 569; *Norton v. Union R. Co.*, 58 Misc. Rep. 188, 109 N. Y. Supp. 73; *Baron v. New York City R. Co.*, 120 App. Div. 134, 105 N. Y. Supp. 258; *Hampe v. Pittsburg & B. Traction Co.*, 165 Pa. St. 468, 30 Atl. 931.

In *Atchison T. & S. F. R. Co. v. Cameron*, 66 Fed. 706, the court said:

"The law seems to be well settled that when a railroad company sells a ticket from one point to another on its own line, it simply engages to carry the passenger to his destination in the customary way, according to such reasonable rules and regulations as it has adopted for the running of its trains. . . . . Railroad companies are bound, of course, to make reasonable running arrangements for the accommodation of the traveling public, but that does not mean that all passenger trains must stop at all stations, or that trains must be so scheduled and run as to enable each passenger to make a continuous trip. . . . We think, therefore, that the sale of the ticket from Gainsville to Moore did not in itself obligate the defendant company to stop the through express at the latter station, and that the sale of the ticket was not in itself an assurance that the plaintiff would be carried through to her destination on that train without change of cars."

In most of these cases, such regulations were made without express sanction, and sustained by reference to the general right of public carriers to make reasonable rules and regula-

tions for the conduct of their business. But here we have not only a right vested in the company by its franchise to make all rules and regulations for its government and operation that are not in conflict with the laws of the state or the ordinances of the city, but the regulation has been actually endorsed by the city itself. As against this array of authority, we are cited to the case of *Union Pac. R. Co. v. Hall*, 91 U. S. 343. In that case the real controversy was as to whether Council Bluffs, Iowa, or Omaha, Nebraska, was the terminus of the road. The court held, construing the Federal grant, that the company was required, so far as the public and the government are concerned, to operate its route as one connected continuous line. It, therefore, compelled the company to haul its trains without transfer of passengers or freight across the Mississippi river. The case is not in point, for in that case the company was acting in violation of its contract with the government. In this case, appellant is acting in strict accord with the permission of the city government.

It is further insisted that it has been shown that the service will be inefficient by reason of a number of the electric cars being diverted by way of Pike street. It is within the power of the city under the franchise to require a service adequate to meet the demands of the patrons, and courts will not presume that the public officers to whom that function is entrusted will neglect to discharge a duty when it is especially enjoined.

Respondent also insists that, under the following clause in the franchise:

"In case any existing railway is acquired and used as a part of the system hereby authorized, the operation of so much thereof as is embraced in any of the routes hereinbefore described shall be continued with only so much interruption as is actually necessary to make the same conform with the provisions of this ordinance;"

appellant is inhibited from running cars from Madison street to the Fourteenth avenue line. We think the clause quoted

clearly refers to the lines not then a part of the established system and which might thereafter be acquired.

Finally, respondent raises the point that transfers could not be compelled under the new order, especially upon commutation tickets. The company is bound under the terms of its franchise to issue transfers. The issuance of transfers from one line to another is a matter wholly within the control of the city, and we cannot make an order in anticipation of a breach of the contract by the company. It will be time enough when a case arises calling for action on our part.

A number of affidavits were submitted to the trial court tending to show that, because of the heavy grades, it will be impracticable, if not impossible, to operate an electric line from Twenty-second avenue to Twenty-ninth avenue, being a part of the proposed electric line. These affidavits were met by counter affidavits on the part of the appellant. This question was no doubt considered and decided by the board of public works of the city of Seattle, whose peculiar function it is to determine all engineering problems; and although the showing made by the respondent might, in the absence of a counter showing, be sufficient to warrant the interposition of a court of equity, we think the court would be unwarranted, upon conflicting evidence, in setting up its judgment against that of the board, for it is vested with a quasi judicial authority.

For the reason that the contracting parties have agreed that the change may be made, and as it seems to be within the contract privileges of the parties, and under the authorities cited is not in law unreasonable, the judgment of the lower court is reversed, with instructions to dissolve the temporary injunction.

RUDKIN, C. J., CROW, DUNBAR, and MORRIS, JJ., concur.

[No. 8991. Department Two. December 3, 1910.]

J. F. EVERETT *et al.*, *Appellants*, v. BENJAMIN S. PASCHALL, *Respondent*.[1]

NUISANCE—WHAT CONSTITUTES—SANITARIUM—"COMFORT." A tuberculosis sanitarium maintained in a residential section of the city will be enjoined as a nuisance, where the fear and dread of the disease is such that it depreciates the value of adjacent property to an extent of one-third or one-half, and interferes with the comfortable enjoyment thereof, disturbing the minds, nerves and sleep of the occupants; especially in view of Rem. & Bal. Code, § 8309, defining a nuisance as any act that either annoys or endangers the comfort or repose of others.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 25, 1910, upon findings in favor of the defendant, dismissing on the merits an action to enjoin the maintenance of a nuisance. Reversed.

Reynolds, Ballinger & Hutson, for appellants.

F. J. Carver, Arthur E. Griffin, and *John Slattery*, for respondent.

CHADWICK, J.—The findings of the trial judge show that plaintiffs are the owners of, and reside upon, lot 14, block 19, Madison Park addition to the city of Seattle, in King county; that their property is of the value of $2,000. Defendant is the owner of the south half of lots 12 and 13, block 9, upon which a cottage is situated. An alleyway separates plaintiffs' lot from the fractional lots of the defendant. On November 29, 1909, defendant opened, and has since maintained in his cottage, a private sanitarium for the treatment and care of persons afflicted with tuberculosis. The sanitarium has a capacity for accommodating ten patients, and since opening, there have been from four to ten patients under treatment.

[1]Reported in 111 Pac. 879.

The court found, also, that the Madison Park addition is an established residential portion of the city; that the danger zone of tuberculosis is about three feet, beyond which there is no danger of infection or contagion; that pulmonary tuberculosis is a germ disease, thriving only in warmth and darkness, and propagating only in living animals; that the germ is destroyed by exposure to daylight without and suffused light within rooms, in from a few minutes to a few hours; that the danger can be reduced to a negligible quantity by proper care of the expectorants and disinfection of the vessels used by the patients, their clothing, and the surroundings; that defendant was conducting his sanitarium with a due regard for the safety of his patients and the public; that there was no danger to persons living in the immediate vicinity; that the sanitarium had been in the past, and would in all probability continue to be, a great benefit to the community. After finding that the best results could be obtained only by locating the sanitarium within easy reach of the attending physicians, and within easy access of markets where proper food could be obtained, the court found also:

"That the disease of pulmonary tuberculosis is very prevalent, and that one-seventh of the deaths in the United States are caused by pulmonary tuberculosis; . . . that said sanitarium conducted by the defendant is not a menace to the plaintiffs, or either of them, or to any person living in any building which may hereafter be erected upon the lots owned by the plaintiffs; . . . that the germs of tuberculosis may be carried by house flies from the sputum of consumptives; . . . that there exists a general public dread of tuberculosis, and the maintenance of a tubercular hospital in the vicinity of residences detracts from the comfortable use of such residential property, on account of the dread of contagion therefrom, in the minds of persons ignorant of the true nature of the disease and the harmlessness of such sanitaria; . . . that the plaintiffs' property will, by the maintenance of said sanitarium be less salable and lessened in value from 33 1-3 per cent to 50 per cent and the other prop-

erty in said neighborhood will be lessened in value in decreasing ratio, depending upon the distance located from said sanitarium."

From these findings, and others which we have not deemed it necessary to notice, the court made the following conclusions of law:

"(1) That any and all damages, if any, which the plaintiffs have sustained in the past and will sustain in the future by reason of the maintenance and operation of said sanitarium conducted by the defendant, if continued to be conducted as it now is, are *damnum absque injuria.*

"(2) That the plaintiffs are not entitled to an injunction in this action enjoining or preventing the defendant from operating or maintaining the sanitarium owned and conducted by the defendant.

"(3) That said sanitarium is not a nuisance *per se* and is not a nuisance in the manner in which it is being conducted.

"(4) That the defendant is entitled to have this action dismissed and entitled to recover of and from the plaintiffs his costs and disbursements herein."

From these conclusions, and the decree thereupon rendered, plaintiffs have appealed.

The text of our decision has been aptly stated by counsel for appellant: "Can a tuberculosis hospital be maintained in a residential portion of a city, where its maintenance depreciates the value of contiguous property from thirty-three and one-half to fifty per cent, and where its existence detracts from the comfortable use of such residential property?" In the evolution of the law of nuisance, there has grown an element not clearly recognized at common law. Blackstone, 3 Com. 216, has defined a nuisance to be "anything that worketh hurt, inconvenience, or damage"; reducing the nuisances which affect a man's dwelling to three, (1) overhanging it; (2) stopping ancient lights, and (3) corrupting the air with smells. It will be seen that, within these definitions, the maintenance of a sanitarium conducted with due attention to sanitation is not a nuisance, for it creates no physical in-

convenience whatever. But a new element in the law of nuisance has been developed, first by judicial decisions, and later, by declaratory statutes—that is, the comfortable enjoyment of one's property. It is written in the statutes of this state:

"Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency . . . or in any way renders other persons insecure in life, or in the use of property." Rem. & Bal. Code, § 8309.

Respondent contends, and the court has found, that the property of respondent is not a nuisance *per se*, and that it is so conducted that it is not, and cannot be, a nuisance by reason of its use; that there is no real danger; that the fear or dread of the disease is, in the light of scientific investigation, unfounded, imaginary, and fanciful; and that the injury, if any, is *damnum absque injuria*. On the other hand, the appellants insist that the location of a sanitarium for the treatment of a disease, of which there is a positive dread which science has so far failed to combat, so robs them of that pleasure in, and comfortable enjoyment of, their home as to make it an actionable nuisance under the statute; and furthermore, under the findings of the court, that the presence of the sanitarium in a district given over to residences, and which has depreciated property from thirty-three to fifty per cent, is such a deprivation of property as will warrant a decree in their favor under the maxim *sic utere tuo ut alienum non laedas*.

Waiving for the present the substantial pecuniary damage which the court found to exist, and addressing ourselves to the principle underlying the lower court's decree—that is, that the danger being only in the apprehension of it, a fear unfounded and unsustained by science, a demon of the imagination—the courts will take no account of it; if dread of the disease and fear induced by the proximity of the sanitarium, in fact, disturb the comfortable enjoyment of the

property of the appellants, we question our right to say that the fear is unfounded or unreasonable, when it is shared by the whole public to such an extent that property values are diminished. The question is, not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real, in that it affects the movements and conduct of men. Such fears are actual, and must be recognized by the courts as other emotions of the human mind. That fear is real in the sense indicated, and is the most essentially human of all emotions, there can be no doubt. M. Fernande Mazade has addressed his inquiries to this subject, and has but recently given his views, as well as the opinions of others, in the Paris *Revue*. Current Literature, Vol. 49, No. 3, p. 290 (Sept. 1910). The opinions collected are worth noticing. Alfred Capus, the psychological playwright, says: "Fear consists in capitulating to the instinct of self-preservation." M. Frederick Passy, of the Institute, "The bravest of men have known what fear is." M. Sicard, a professor of the Faculty of Medicine, considers fear or courage to be the result of temperament, training, and thought, and which can be partially eradicated by reasoning and education, but never to be overcome in its most acute form, namely, the instinct of self-preservation. The conclusion of the editor is that, "it is far from being unanimously admitted that fear is a ridiculous malady, or one of which one need be ashamed in ordinary circumstances."

Comfortable enjoyment means mental quiet as well as physical comfort. In *Deaconess Home & Hospital v. Bontjes*, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215, under conditions which "greatly disturb the comfort and nerves and sleep of the inmates of complainants' home, and she and her family were greatly annoyed and distressed in mind," an injunction was sustained against the hospital as destructive to the peace, quiet, and comfort of the complainant. What "comfortable enjoyment" may be, must be determined by reference to the substantive word "comfort." This word has

not been specifically defined in connection with nuisance cases. In *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654, Chancellor Zabriskie says: "No precise definition can be given; each case has to be judged by itself;" but in *Forman v. Whitney*, 2 Keyes (N. Y.) 165, Webster's definition is adopted: "It implies some degree of positive animation of the spirits, or some pleasurable sensations derived from happy and agreeable prospects;" the court adding: "The word embraces whatever is requisite to give security from want, and furnish reasonable physical, mental and spiritual enjoyment."

Nuisance is a question of degree, depending upon varying circumstances. There must be more than a tendency to injury; there must be something appreciable. The cases generally say tangible, actual, measurable, or subsisting. But in all cases, in determining whether the injury charged comes within these general terms, resort should be had to sound common sense. Each case must be judged by itself. Joyce, Nuisances, 19. Regard should be had for the notions of comfort and conveniences entertained by persons generally of ordinary tastes and susceptibilities. *Columbus Gas Light & Coke Co. v. Freeland*, 12 Ohio St. 392; *Barnes v. Hathorn*, 54 Me. 124. The nuisance and discomfort must affect the ordinary comfort of human existence as understood by the American people in their present state of enlightenment. Joyce, Nuisances, § 20. The theories and dogmas of scientific men, though provable by scientific reference, cannot be held to be controlling unless shared by the people generally. In *Grover v. Zook*, 44 Wash. 494, 87 Pac. 638, this court said:

"That pulmonary tuberculosis is both contagious and hereditary, as these terms are understood (although not in a strictly technical and professional sense), as well as infectious, admits of little, if any, doubt."

This principle applies with peculiar force in this case, for aside from the general dread of the disease, as found by the court, it is also shown that the security of the public depends upon proper precautions and sanitation, which may at any

time be relaxed by incautious nurses or careless or ignorant patients.

Furthermore, the court found that the bacilla of the disease may be carried by house flies. Thus, every house fly that drones a summer afternoon in the drawing room or nursery is a constant reminder to plaintiffs of their neighbor, tending to disquiet the mind and render the enjoyment of their home uncomfortable.

The only case we find holding that fear alone will not support a decree in this class of cases is *Anonymous*, 3 Atk. 750, where Lord Hardwicke said: "And the fears of mankind, though they may be reasonable ones, will not create a nuisance." Our statute modifies, if indeed it was not designed to change this rule. Under the facts, we cannot say that the dread which is the disquieting element upon which plaintiffs' complaint is made to rest, is unreal, imaginary, or fanciful. In so doing, we are not violating the settled principles of the law, but affirming them. We conceive the case of *Stotler v. Rochelle* (Kan.), 109 Pac. 788, to be directly in point. There we find the same contentions made as here. The question was, whether the fear of cancer was sustained in the light of medical authority. The court said:

"In the present state of accurate knowledge on the subject, it is quite within bounds to say that, whether or not there is actual danger of the transmission of the disease under the conditions stated, the fear of it is not entirely unreasonable."

The unusual feature of that case, in that judicial notice is taken of the fact that fear may be urged as a ground for injunctive relief, challenged the interest of the Hon. John D. Lawson, the learned editor of the American Law Review. He takes no issue with the rule. He says:

"A hospital, said the court, is not a nuisance *per se*, or even *prima facie*, but it may be so located and conducted as to be a nuisance to people living close to it. The question was not whether the establishment of the hospital would place the occupants of the adjacent dwellings in actual danger of

infection, but whether they would have reasonable ground to fear such a result, and whether, in view of the general dread inspired by the disease, the reasonable enjoyment of their property would not be materially interfered with by the bringing together of a considerable number of cancer patients in this place. However carefully the hospital might be conducted, and however worthy the institution might be, its mere presence, which would necessarily be manifested in various ways, would make the neighborhood less desirable for residence purposes, not to the oversensitive alone, but to persons of normal sensibilities. The court concluded that upon these considerations the injunction was rightfully granted. The plaintiff, as the owner and occupant of adjacent property, had such a peculiar interest in the relief sought as to enable him to maintain the action." Vol. 44, American Law Review, No. 5, p. 759.

In the case of *Baltimore v. Fairfield Imp. Co.*, 87 Md. 352, 39 Atl. 1081, 67 Am. St. 344, 40 L. R. A. 494, an injunction against placing a leper in a residence neighborhood for care and restraint was justified upon the ground that the disease produced a terror and dread in the minds of the ordinary individual. In that case, the court said:

"Leprosy is and has always been, universally regarded with horror and loathing. . . . The horror of its contagion is as deep-seated today as it was more than two thousand years ago in Palestine. There are modern theories and opinions of medical experts that the contagion is remote and by no means dangerous; but the popular belief of its perils founded on the Biblical narrative, on the stringent provisions of the Mosaic law that show how dreadful were its ravages and how great the terror which it excited, and an almost universal sentiment, the result of a common concurrence of thought for centuries, cannot in this day be shaken or dispelled by mere scientific asservation or conjecture. It is not, in this case, so much a mere academic inquiry as to whether the disease is in fact highly or remotely contagious; but the question is whether, viewed as it is by the people generally, its introduction into a neighborhood is calculated to do a serious injury to the property of the plaintiff there located."

In *Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267, 125

Am. St. 566, a temporary restraining order was granted against the maintenance of a tuberculosis hospital, notwithstanding evidence was introduced, as in this case, tending to show that the establishment of such a hospital, if properly maintained and conducted, would not be a menace to the health of the community, but in fact a benefit. We have no cases in this state directly in point, yet a case not without bearing is that of *Shepard v. Seattle*, 59 Wash. 363, 109 Pac. 1067. Judge Rudkin, delivering the opinion of the court, said:

"The presence of a private insane asylum, with its barred windows, and irresponsible inmates, would annoy, injure, and endanger the comfort, safety, and repose of any person of average sensibilities, if located within two hundred feet of his place of abode. In other words, it is a matter of common knowledge that the presence of such an institution in a residential portion of a city would practically destroy the value of all property within its immediate vicinity for residence purposes."

We therefore conclude that the lower court erred in denying an injunction. The case is remanded with instructions to enter a decree upon the findings in favor of appellant.

RUDKIN, C. J., CROW, DUNBAR, and MORRIS, JJ., concur.

[No. 9064. Department Two. December 6, 1910.]

GEORGE E. SHAW, *Appellant*, v. WOODLAND SHINGLE COMPANY, *Respondent*.[1]

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated on the sustaining of an objection to testimony, where all the evidence of the witness was admitted under other questions.

MASTER AND SERVANT — TOOLS — GUARDING MACHINERY—FACTORY ACT—PRACTICABILITY—EVIDENCE—ADMISSIBILITY. Where the question of practicability is in issue, it is not error to allow the defendant to show by experts that other mills under similar circumstances had found a certain guard for a shingle saw to be impracticable, under Rem. & Bal. Code, § 6587, requiring guards for all machinery which it is practicable to guard.

SAME—INSTRUCTIONS. It would seem that an instruction requiring any practicable guard on a shingle saw which would still leave it possible to operate the saw in a way to be "commercially profitable," is the legal equivalent of Rem. & Bal. Code, § 6587, requiring guards for all machinery which it is practicable to guard.

TRIAL—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE. It is not prejudicial error to define the "fair preponderance" of the evidence to be such as produces conviction in the mind, where the court qualified the same by adding, "not the number of witnesses, but the most credible evidence; that which satisfies the minds, the minds as jurors."

Appeal from a judgment of the superior court for King county, James Kiefer, Esq., judge *pro tempore*, entered February 14, 1910, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained by an employee in a shingle mill. Affirmed.

M. J. McGuiness, Reynolds, Ballinger & Hutson, and *Robert McMurchie*, for appellant.

Peters & Powell, for respondent.

CHADWICK, J.—Plaintiff was injured in a shingle mill, owned and operated by the defendant at Ballard in King

[1]Reported in 111 Pac. 1070.

county. It is the contention of the plaintiff that he was put to work at a left-hand knot saw when he was a right-hand operator. We think that no further statement of the facts is necessary. Plaintiff brought this action to recover damages, and appeals from a verdict rendered in favor of the defendant.

It is first assigned that the court erred in sustaining an objection to testimony. A witness was asked whether he had seen a guard, a model of which was exhibited, or similar guards in use in shingle mills. After objection and some colloquy, the court ruled that the witness could "testify as to whether or not it is practicable to put a guard upon a saw of that kind." No exception was taken to this ruling, and the witness answered, "It is." He then answered that the particular guard was a practicable guard. Inasmuch as appellant proved by the witness all that he had set out to prove, we find no basis for this assignment.

It is further contended that respondent was permitted to show that other mills and more modern mills were not equipped with guards. It is not contended that a compliance with the statute, Rem. & Bal. Code, § 6587, can be excused by showing that other mills had not complied with the provisions of the law; but where, as in this case, the question of practicability was a direct issue before the jury, it cannot be held to be error, where the opinions of skilled persons are offered to prove the custom, although it may develop upon their examination that other mills with which they are acquainted and upon which their opinions are based have not found guards to be practicable. This case differs in this respect from *Daffron v. Majestic Laundry Co.*, 41 Wash. 65, 82 Pac. 1089, and *Johnson v. Northern Lumber Co.*, 42 Wash. 230, 84 Pac. 627, where there was no question as to the practicability of guarding the machinery, the only issue being whether it had been properly done. The statute provides:

"Any person, firm, corporation or association operating a factory, mill or workshop where machinery is used shall pro-

vide and maintain in use . . . reasonable safeguards for all . . . machinery . . . which it is practicable to guard and which can be effectively guarded with due regard to the ordinary use of such machinery and appliances, and the danger to employees therefrom." Rem. & Bal. Code, § 6587.

But it does not change the rules of evidence, and the question of practicability may be determined by any evidence which would be competent in other cases. Appellant recognized this rule in his own case by asking his witness Bullock if he had ever seen guards upon the upper portion of knot saws. It would seem that the rule could hardly be otherwise, when it is the law that the certificate of the state labor commissioner is *prima facie* evidence that the factory act has been complied with (Rem. & Bal. Code, § 6593), which is no more than saying that the machine could not be effectively guarded in any manner that would have permitted of its reasonable use. If it develops that knot saws in practically all other mills are without guards, it is competent evidence tending to sustain the finding of the commissioner whose duty it is to inspect all mills, and to meet the testimony offered to overcome the presumption raised by the certificate. For all mills are bound to maintain a standard which, under the factory act, is the highest degree of care consistent with the practical operation of the machinery.

"The distinction is in itself a simple one. (1) The conduct of others evidences the tendency of the thing in question; and such conduct e. g. in using brakes on a hill, felt shoes in a powder-factory, railings around a machine, or in not using them—is receivable with other evidence showing the tendency of the thing as dangerous, defective, or the reverse. But this is only evidence. The jury may find from other evidence that the thing was in fact dangerous, defective, or the reverse, and that its maintenance was or was not negligence, in spite of the above evidence. (2) Meanwhile, the substantive law tells them what the standard of conduct for negligence is; and this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a

sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be improper. This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law."

"This distinction is patent enough, but it is sometimes judicially ignored. Such evidence is sometimes improperly excluded on the erroneous supposition that the mere reception of it implies that it is to serve as a legal standard of conduct. The proper method is to receive it, with an express caution that it is merely evidential and is not to serve as a legal standard." Wigmore, Evidence, § 461.

In *Crooker v. Pacific Lounge & Mattress Co.*, 34 Wash. 191, 75 Pac. 632, the rule was invoked by the plaintiff in the case, and the reception of testimony tending to show that it was the custom of sawmill men to guard ripsaws was assigned as error. This court said:

"We think the proof complained of was relevant on the question whether the appellant had exercised reasonable care in not following a custom in guarding ripsaws; not that a compliance with the particular custom would necessarily exonerate, or noncompliance necessarily charge it with negligence; but its conduct in that regard was a material fact for the consideration of the jury, in connection with the other facts and circumstances developed by the evidence in the case. See, *Bodie v. Charleston, etc. R. Co.*, 61 S. C. 468, 39 S. E. 715, wherein the court observes: 'It was for the jury to say whether such usual or customary method was such as a careful and prudent person should adopt under the circumstances.' "

The logic which sustains the rule in favor of the plaintiff, sustains it when invoked by the defendant. Such testimony was received in *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 86 Pac. 588, although the question there was one of pleading; while the principle is squarely announced in *Sipes v. Puget Sound Elec. R.*, 54 Wash. 47, 102 Pac. 1057. The court said:

"The ruling of the court admitting testimony tending to show the flagging system in use on other roads of like character, is next assigned as error. The standard of due care is the conduct of the average prudent man. It would doubtless have been competent for the appellant to show that its flagging system was the one in general use on other roads of like character throughout the country, and it would seem equally competent for the respondent to prove that a like flagging system was not in use elsewhere. Such testimony would not be at all conclusive against the appellant, but it was proper for the consideration of the jury."

See, also, *Wabash R. Co. v. Farrell*, 79 Ill. App. 508; *Meyers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631, 15 Am. St. 176; *Berg v. United States Leather Co.*, 125 Wis. 262, 104 N. W. 60; *Belleville Stone Co. v. Comben*, 61 N. J. L. 353, 39 Atl. 641.

It does not follow that such testimony would be competent in all negligence cases. There must be a similarity in the machinery or the surrounding circumstances, and that the rule may not be abused it has been held that the ordinary discretion vested in a trial judge is to be exercised in allowing or rejecting this character of testimony. *Ford v. Mt. Tom Sulphite Pulp Co.*, 172 Mass. 544, 52 N. E. 1065, 48 L. R. A. 96; *Dolan v. Boott Cotton Mills*, 185 Mass. 576, 70 N. E. 1025. The court brought the testimony within these rules of law by proper instruction, saying:

"In determining what machinery can and what cannot be effectively guarded in this matter, you may take consideration what is the custom of other prudent persons operating similar machinery with respect to guarding the same."

He also said, in ruling upon the admission of this evidence:

"It may aid the jury in determining the practicability of this guard or not. That is an issue in this case."

Appellant relies on *Barclay v. Puget Sound Lumber Co.*, 48 Wash. 241, 93 Pac. 430, but as we read that case it in no wise contradicts the rule as we believe it to be. The court there held that it was the duty of mill owners to "adopt such

guards as reasonable prudence, observation and care would suggest, regardless of the question whether other owners or operators of other mills have taken action on like machinery or not." But it was not held that, where the question was whether a machine could be guarded in an advantageous or practicable way, such evidence would be rejected. The case goes no further than to hold that such evidence will not fix a standard of conduct.

Appellant contends that the court erred in submitting the following question to the jury:

"Could that knot saw on which plaintiff was employed be guarded by any practicable guard which would still leave it possible to operate that machine for the purpose for which it was intended, in such a way as to make it commercially profitable to the owner of the mill, and enable the operator to earn a living wage."

The words "commercially profitable" are challenged, although it would seem that they are legally equivalent to the words of the statute which require machinery to be guarded only when it can be done without impairing its practicable use. In any event, the court in other instructions laid down the rule without the objectionable words; so that, if it was error, it cannot be held to be prejudicial.

It is also contended that the court improperly defined the term "a fair preponderance of the evidence," in that he said that it was such evidence as "produces conviction in your mind." But the court went further, saying that it meant "not the number of witnesses, but the most credible evidence; that which satisfies the minds, the minds as jurors." The words complained of were inadvertent, but as qualified do not seem to be sufficiently prejudicial to warrant a reversal of the case. The term "preponderance of evidence" has been defined in *McKenzie v. Oregon Imp. Co.*, 5 Wash. 409, 31 Pac. 748, and in thousands of other cases, and by textwriters. Proof to a demonstration is not required, and it is usually un-

fortunate to employ qualifying words when defining the necessity for a preponderance of evidence.

Other errors are assigned, but they are covered by what we have already said, and need no further discussion.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MORRIS, JJ., concur.

[No. 9039. Department One. December 5, 1910.]

LOUIS MORIN, *Appellant*, v. WILLIAM BREMER *et al.*, *Respondents*.[1]

LANDLORD AND TENANT—RIGHTS OF TENANT—REMOVAL OF BUILDING—SALE OF PREMISES. A lessee, who erected a building on the premises under a recorded lease giving her the right to remove it, cannot recover the alleged price of the building from the lessor on his sale of the premises to one having notice of the lease; since the building still belonged to the lessee who remained in possession with the right of removal (GOSE and FULLERTON, JJ., dissenting).

Appeal from a judgment of the superior court for Kitsap county, Main, J., entered June 8, 1910, in favor of the defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff, for money had and received. Affirmed.

John H. Allen, for appellant.

Frank P. Lewis and *Louis Henry Legg*, for respondents.

MOUNT, J.—Appellant brought this action to recover from the respondents $900, alleged to have been received by reason of the sale of a building belonging to appellant. The case was tried to the court and a jury. Verdict was rendered in favor of the appellant for the full amount claimed. The court thereupon entered a judgment for the defendants notwithstanding the verdict. The plaintiff has appealed.

The facts are as follows: In the year 1908, the respondents were the owners of certain town lots in the town of Brem-

[1]Reported in 111 Pac. 1058.

erton. They then entered into a written lease with the plaintiff for one of these lots, by which lease it was agreed that the plaintiff might erect a building on the lot, and at the expiration of the lease, could remove the building, which was to remain the property of the plaintiff. This lease was acknowledged and duly recorded. At the expiration of the term of the written lease, it was orally agreed that the plaintiff might continue in possession of the premises under a month to month tenancy, with the same right to remove the building. At the expiration of the recorded lease, and while the plaintiff was still in possession of the premises, the defendants sold the land to the Migliavacca Investment Company, by warranty deed, which described the lots and recited that they were conveyed "together with the appurtenances." The purchaser knew of the recorded lease, and that the plaintiff was still in possession of the building on one of the lots. He therefore knew that the plaintiff in this case was, and claimed to be, the owner of the building. There is disputed evidence to the effect that, about the time of the sale, the agent of the defendants said to the purchasers that the building went with the land. The plaintiff still remained in possession of the premises, and continued to do so to the time and at the time of the trial. He testified, however, that the purchaser threatened to eject him, and that he entered into another lease with the purchaser, under which the plaintiff was still holding possession of the premises. We are satisfied that, under these facts, the trial court correctly granted judgment to the defendants notwithstanding the verdict. The building which was erected by the plaintiff was no part of the realty. It was erected with the understanding and agreement that it might be removed, and that it should be and remain the property of the plaintiff. The plaintiff was in possession, and his right to remove the building was not affected by the sale, even if the seller and the purchaser supposed that it went with the land. The building was, and still is, the property of the plaintiff and in his possession.

In *Heighes v. Dollarville Lumber Co.*, 113 Mich. 518, 71 N. W. 870, which is a case almost identical with this case, the court said:

"The circuit judge directed a verdict for the defendant, upon the ground that the plaintiff is, and has been since the house was built, in the full possession of the house and lots, which is conclusive that it has not been converted. If the house was his, the Danahar-Melendy Company got no title, and the plaintiff has a right to remove it at his pleasure, during the continuance of his lawful occupancy of the lots."

In *Davis v. Buffum*, 51 Me. 160, the court said, at page 163:

"Neither can the mere giving a deed of land leased, the lessee continuing in quiet possession, be deemed a conversion of fixtures which the tenant has the right to remove during his term. The lease was as valid after as before the deed. The rights of the lessee remained the same. The deed was no more a conversion of the tenant's fixtures than it was a breach of the covenants of the lease."

See, also, *Horak v. Thompson* (Iowa), 83 N. W. 889.

It is plain, we think, that the interest of the plaintiff in the building and the right to remove the same was not molested by the sale of the real estate. In short, there was no sale of his building and he has no right to complain of the sale of the realty by the defendants to the investment company. We also think that the evidence fails to show that the defendants received any consideration whatever for the plaintiff's building.

The judgment is therefore affirmed.

Rudkin, C. J., and Parker, J., concur.

Gose, J. (dissenting)—I think the respondents intended to sell, and the purchaser intended to buy, the building with the ground. The presumption follows that the vendor received the value of the building. The appellant can, there-

fore, waive the tort and sue for money had and received to the extent of the reasonable value of the building.

I therefore dissent.

FULLERTON, J., concurs with GOSE, J.

[No. 9194. Department One. December 5, 1910.]

C. H. GREEN, *Respondent*, v. E. S. DUNGAN *et al.*, *Appellants*.[1]

APPEAL—REVIEW—VERDICT. A verdict supported by ample and competent testimony will not be reversed on appeal.

Appeal from a judgment of the superior court for King county, Gay, J., entered May 28, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Revelle, Revelle & Revelle, for appellants.

Elias A. Wright, for respondent.

RUDKIN, C. J.—The complaint in this action alleged that on or about the 1st day of September, 1908, the plaintiff employed the defendants, as copartners, to make certain real estate investments for him, and agreed to pay them for their services in that behalf a commission of five per cent on the selling price of all property purchased through them; that on or about the 8th day of September, 1908, the defendants purchased certain real property for the plaintiff for the sum of $5,700, but falsely and fraudulently represented to the plaintiff that the purchase price was $6,850 which last mentioned sum the plaintiff paid therefor, and prayed judgment for the difference. The answer denied the agency and the copartnership, and the case came on for trial before a jury. A verdict

[1]Reported in 111 Pac. 1102.

was returned in favor of the plaintiff in the sum of $515, and from a judgment on the verdict, the defendants have appealed.

It is conceded that the respondent paid the sum of $515 for the property, over and above the purchase price paid to the vendor and a commission of five per cent on the selling price, and the only error assigned in this court is based on the insufficiency of the evidence to establish the agency and the copartnership. These questions were resolved against the appellants by a jury, and their verdict is supported by ample and competent testimony.

The judgment of the court below is therefore affirmed.

FULLERTON, MOUNT, PARKER, and GOSE, JJ., concur.

[No. 8927. Department One. December 5, 1910.]

MAUGHLIN MILL COMPANY, *Respondent*, v. ERIC HAMILTON *et al.*, *Appellants*.[1]

ACTIONS—MISJOINDER OF CAUSES—INJUNCTION—BONDS. An action upon an injunction bond indemnifying the plaintiff to the extent of $500 is not demurrable on the ground of misjoinder of causes of action, from the fact that it alleges damages and prays for judgment in excess of the amount of the bond, where all the damages alleged were of such a nature as to be secured by the bond up to the amount limited thereon.

VENDOR AND PURCHASER—BONA FIDES—CONSTRUCTIVE NOTICE—POSSESSION. A purchaser of timber lands has sufficient notice of a prior unrecorded deed of the timber to put him on inquiry, where he had knowledge that the purchaser of the timber had constructed a logging camp, houses, etc., and a skid road on the land and had cut nearly a million feet of logs then lying on the ground.

APPEAL—REVIEW—HARMLESS ERROR—COUNTERCLAIM—EXCLUSION. It is not prejudicial to exclude evidence of damages under a counterclaim for trespass, in an action upon an injunction bond which restrained the plaintiff from cutting timber on defendants' lands, where the principal issue was over the plaintiff's right to the timber

[1]Reported in 111 Pac. 1067.

conveyed to him by a deed prior to defendants' deed to the land, and both parties were allowed to introduce their evidence on this issue, which was resolved in favor of the plaintiff.

INJUNCTION—BONDS—INDEMNITY—DAMAGES RECOVERABLE. In an action on an injunction bond, to indemnify plaintiffs from damages by reason of a temporary restraining order, until the hearing could be had, returnable May 15, it is not error to allow the plaintiff to show damages suffered up to May 22, at which time the hearing was had and the order dissolved, where it appeared that the plaintiff required that additional time in order to prepare for the hearing.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 20, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

William Martin and *Julius L. Baldwin*, for appellants.

Robert F. Booth, for respondent.

PARKER, J.—This is an action upon a bond executed by the defendant Eric Hamilton as principal, and the defendant American Bonding Company as surety, to secure to the plaintiff costs and damages which might result by reason of the issuance of a restraining order against it at the instance of the defendant Hamilton. The plaintiff, on and prior to May 8, 1908, was conducting a logging camp and carrying on logging operations upon land in King county, under a conveyance of the timber thereon, executed to it in December, 1906, by William E. Mills and wife, the then owners of the land. The allegations of the complaint necessary for us to notice are as follows:

"That on or about the 6th day of May, 1908, the above named defendant, Eric Hamilton, commenced an action in the above entitled court, being cause No. 61,194, entitled 'Eric Hamilton, plaintiff, vs. Maughlin Mill Co., a corporation, defendant'; that said plaintiff therein, Eric Hamilton, on said 6th day of May, 1908, applied to said court for a temporary restraining order enjoining said defendant Maughlin Mill Company, plaintiff herein, from going upon or trespassing upon the land above described, and further restraining said

defendant, plaintiff herein, from cutting and carrying away, or causing to be cut or carried away any timber or trees from said lands or selling, removing, or disposing of any trees or timber cut or removed on or from said lands.

"That in accordance with said application, the above entitled court granted the restraining order on said 6th day of May, 1908, and the same was duly served upon said defendant, Maughlin Mill Company, plaintiff herein, on the 8th day of May, 1908, and that in accordance with said order the said Maughlin Mill Co., shut down its logging camp and ceased operations and remained closed until the 22nd day of May, 1908, when the above entitled court refused to continue said restraining order, and said cause was, on motion of plaintiff therein, Eric Hamilton, dismissed by the court, and judgment entered for said defendant therein.

"That the order granting the restraining order above described required the said plaintiff therein to file a bond in the sum of $500 to indemnify said defendant therein against all costs and damages which might accrue by reason of the issuance of said restraining order, and in accordance with said order, the above named defendant, Eric Hamilton, secured from the above named defendant, American Bonding Company, of Baltimore, an obligation or bond in writing, conditioned to pay all costs and damages that said Maughlin Mill Company might suffer by reason of the issuance of said restraining order, which bond was duly filed, properly executed, and a copy thereof is hereto attached, marked Exhibit A, and made a part hereof.

"That by reason of the shutting down of said logging camp and the ceasing of operations, the above named plaintiff was damaged in the sum of $532.75, as follows:

For loss of time of men employed by month for the period of 13 days	$357.50
For meals furnished to men during said period, of 13 days, and board of horses	45.25
Loss of time of A. J. Maughlin, at $10 per day	130.00
Total	$532.75

"That the above named plaintiff was damaged to the extent of $100 per day by reason of loss of profit during said period of 13 days, or a total sum of $1,300."

The bond attached is in usual form, and the prayer is for judgment against both defendants for the total amount of damages alleged. The complaint was demurred to by the defendants upon the ground, "that several causes of action have been attempted to be improperly united in said complaint." This demurrer was overruled, and thereupon the defendants answered separately. The defendant Hamilton answered, denying that any damage resulted to the plaintiff from the issuance of the restraining order, and alleged affirmatively, in substance, that since August 29, 1907, he has been the owner in fee simple of the land and timber thereon; that he then acquired the land and timber by warranty deed from William E. Mills and wife, without notice actual or constructive of any claim of the plaintiff thereto; that thereafter the plaintiff trespassed upon the land and cut and removed logs therefrom, when the restraining order was applied for and issued; that upon the hearing for the continuance of the restraining order in force pending the suit "the court ruled that a permanent restraining order would not lie to prevent trespass upon land because there was an adequate remedy at law;" and thereafter the suit was dismissed at the instance of the plaintiff Hamilton, the defendant in this action.

The defendant Hamilton in his answer, as a "further and affirmative defense and cross-complaint," alleged trespass upon the land by the plaintiff since August 29, 1907, the date of the conveyance from Mills and wife to him, claiming treble damages on account thereof in the sum of $7,978. The answer of the defendant bonding company, is in substance the same as that of Hamilton, omitting the cross-complaint. A trial before the court and a jury resulted in a verdict for the plaintiff in the sum of $470. The defendants' motion for a new trial was denied, and judgment was entered upon the verdict. The defendants have appealed.

It is first contended by learned counsel for appellants that the complaint improperly unites a cause of action based upon tort with one based upon contract, and that therefore the

demurrer to the complaint upon that ground was erroneously overruled by the superior court. It is clear that the complaint states a good cause of action upon the bond, though it alleges facts showing damages in a much larger sum than the amount of the bond. The damages alleged, however, if the allegations of the complaint be true, all resulted from the issuance of the restraining order, and therefore were secured by the bond to the extent of the amount of the bond. In order to hold that there is here pleaded two causes of action which cannot be joined, we would have to so hold solely upon the ground that the amount of damages claimed exceeded the amount of the bond. It is true the prayer is for a larger judgment than the amount of the bond, but it is not a different judgment against each appellant. It is simply a prayer for a larger judgment than the pleaded facts show the respondent is entitled to. The fact that a plaintiff alleges items aggregating more than he is entitled to recover, and prays for judgment accordingly, does not defeat his right to recover in that action the amount he is in fact entitled to, even though this situation should appear on the face of his complaint, if the items are all of such nature that, if recoverable at all, they are secured by the obligation sued upon, up to the amount limited by such obligation.

Our attention is called to *Willey v. Nichols*, 18 Wash. 528, 52 Pac. 237, relied upon by appellants. That was an action where the plaintiffs sought to recover from the principal and sureties upon a temporary injunction bond the amount of the bond, $200, for damages resulting from the issuance of the injunction; and in the same action sought to recover from the principal alone, who was plaintiff in the injunction suit, $1,550 damages, alleged to have resulted from his malicious prosecution of the injunction suit. This court held these causes could not be united. That was clearly a different situation from the one here presented. We do not think that this complaint attempts to state two causes of action. The overruling of the demurrer was not erroneous.

It is contended in behalf of appellants that the trial court was in error in refusing to grant the nonsuit asked for by appellants' counsel at the close of respondent's evidence; the argument being that the evidence was not sufficient to warrant the submission of the case to the jury. The trial proceeded upon the theory that respondent's right to recover depended upon its title to the timber and its right to be upon the land and prosecute its logging operations there, at the time of the issuance of the restraining order. There is no question of the sufficiency of the conveyance of the timber by Mills and wife to respondent in December, 1906, whereby it was given five years to remove the timber, as between Mills and wife and respondent. This conveyance, however, was not recorded in the county auditor's office when appellant Hamilton purchased the land. So that when appellant Hamilton acquired his title to the land by warranty deed from Mills and wife in August, 1907, the right of respondent became dependent upon the notice appellant Hamilton then had of its right to the timber. This became the primary issue of fact in the case; and if rightly determined by the jury in respondent's favor, all other questions of fact, save the amount of respondent's damages, became immaterial.

Upon the question of appellant Hamilton's having notice of respondent's rights, there was evidence tending to show the following: In February, 1907, respondent went upon the land and commenced the establishment of a logging camp there, and soon thereafter completed a stable, bunk-house, cook-house, office, water tank with tower, and some other small structures. It also built a skid road upon the land, rendering practically all of the land and timber accessible. It commenced and carried on logging operations and had cut in the neighborhood of three quarters of a million feet of logs up to the 29th of August, 1907, the date of appellant Hamilton's purchase of the land. These logs were all lying upon the ground at that time. There was also evidence tending to show that appellant Hamilton had actual knowledge

of the operations and business of respondent in that neighborhood such as would put an ordinarily prudent person upon inquiry as to respondent's claim of right to this timber. Without further reference to the evidence tending to show that appellant Hamilton had notice of respondent's claim, we deem it sufficient to say that we think the evidence was ample to warrant the jury in concluding that he had such notice when he purchased the land, even though the conveyance of the timber from Mills and wife to respondent had not been recorded. The jury was fairly instructed upon the question of notice by possession, in harmony with the views heretofore expressed by this court in *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320, 329, 55 Pac. 310. Upon the question of the amount of damages awarded by the jury, we think the evidence was ample to support the jury's finding upon that question. We are of the opinion that the denial of the motion for nonsuit was not erroneous.

We have noticed that appellant Hamilton by his cross-complaint claimed damages against respondent on account of its alleged trespass upon the land after he had acquired title thereto by the conveyance to him from Mills and wife. Upon the trial, counsel for respondent objected to the introduction in behalf of appellant Hamilton of any evidence of damages resulting from this alleged trespass, upon the ground that the issues raised by the cross-complaint were not properly in the case. The court sustained this objection, apparently upon the ground that the cross-complaint did not constitute such a counterclaim as may be properly contained in an answer to the complaint in this action. It is argued that this was error. Since the jury must have found, upon sufficient evidence, as we have noticed, that respondent was rightfully upon the land, removing its timber therefrom, the exclusion of evidence of the amount of appellant Hamilton's alleged damage caused by respondent's alleged trespass could, in no event, have been prejudicial error. It necessarily followed from the jury's finding that respondent was not guilty of trespass. Neither

party was restricted by the court in the introduction of evidence tending to show their respective rights to the timber. Indeed, this was conceded to be, as we have already noticed, the primary question for the jury to determine. When it was resolved by the jury in respondent's favor there was not, in any event, any damages resulting to Hamilton.

The restraining order was returnable May 15, and by consent of all parties the hearing thereon was continued until May 22, to enable respondent to prepare therefor. It is contended that the trial court erroneously admitted evidence of damage resulting to respondent from the delaying of their business during this period. In view of the evidence showing the necessity for respondent having this additional time to prepare for the hearing, we think it was not error to admit evidence of damage caused by the delay of the business of respondent during this period, as well as the damage resulting from delay of its business caused by the restraining order before the return day fixed in the order.

We find no prejudicial error in the record. Appellants had a fair trial, and the evidence was ample to support the verdict. The judgment is affirmed.

RUDKIN, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 8987. Department One. December 5, 1910.]

HARDMAN ESTATE, *Appellant*, v. JAMES A. MCNAIR *et al.*, *Respondents*.[1]

LANDLORD AND TENANT—RENTS—LEASE—CONDITION OF PREMISES—IMPLIED WARRANTY. Where, by the terms of a lease, the premises were to be arranged by the lessors for a cafe and kitchen, and the lessees were prohibited from making any other use of the same, the lessor cannot recover rent without complying with the lease, nor invoke the general rule that there is no implied warranty of the fitness of demised premises.

SAME—LEASE—CONDITION OF PREMISES—TERMS—CONSTRUCTION. A lease providing that the lessor shall arrange the premises for a kitchen and cafe "as in its judgment shall be best," and prohibiting the lessee from making other use of the same, does not make the lessor the sole judge of the fitness of the place to the extent of relieving it of all obligation to produce the results contemplated.

NEW TRIAL—GROUNDS—SURPRISE—EVIDENCE. Introduction by defendant of evidence material to the issues disclosed by the pleadings cannot be made the ground of a new trial on the ground of surprise, where the plaintiffs were not misled to believe that no evidence of that nature would be used against them.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial should not be granted for newly discovered evidence that is merely cumulative and not likely to change the result.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 22, 1910, upon findings in favor of the defendants, in an action on contract. Affirmed.

Reed & Hardman, for appellant.

Kerr & McCord, for respondents.

PARKER, J.—This is an action to recover rent alleged to have accrued since July 1, 1909, upon a lease of the basement of the Hotel Wilhard Building, in Seattle. The provisions of the lease necessary for us to notice are the following.

[1]Reported in 111 Pac. 1059.

"The lessor agrees to arrange the west basement room, as in its judgment shall be best, for a cafe, and arrange the east room for kitchen and servants' quarters (it shall not, however, furnish any fixtures, furniture or other equipment), it being understood that in the event it is impracticable to arrange servants' quarters in the east basement that would comply with the city ordinances governing in such cases, the space shall be left to be used for such other purposes as the lessees may see fit; the rent to commence from the date the premises are ready for occupancy.

"Said lessee shall not do or permit to be done anything unlawful in the said premises nor use said premises for any other purpose than that of a cafe, or other incidental purpose connected with the business of running a hotel."

The complaint alleges that the plaintiff completed the arrangement of the premises as agreed about June 25, 1909, and notified the defendants that the premises were ready for occupancy about June 28, 1909; and that the defendants agreed to accept the premises as of July 1, 1909. The defendants deny their acceptance of the premises; and allege, in substance, that the premises have not been completed as agreed, that they are unsuitable and unfit for cafe and kitchen purposes, and that the defendants are therefore unable to use them for any purpose contemplated by the lease. The case was tried by the court without a jury, resulting in findings and judgment in the defendants' favor. The plaintiff has appealed.

The trial court found, in substance, the following: Appellant made certain alterations in the premises, and on June 28, notified respondents that the premises were ready for occupancy; and on July 1, demanded of respondents the payment of the rent for July. On June 28th respondents advised appellant that they would accept the premises on July 1, if the same were in fact ready for occupancy; but that on that day the premises had not been completed, and were unfit for use and respondents refused to accept the same and refused to pay the rent demanded. Rent has been demanded for each month since then and payment refused. The prem-

ises have never been completed as agreed, and are unfit for use for the purpose contemplated, and for that reason respondents have refused to accept the same, and refused to pay the rent.

The principal contentions of learned counsel for appellant arise upon exceptions to the court's finding relating to the failure of appellant to complete the premises as agreed, and upon their exception to the refusal of the court to find, as requested by appellant, to the effect that the premises were completed as agreed and that respondents accepted the premises before July 1. We have carefully read all of the evidence, but will not attempt a detailed review of it here. There was conflict in the evidence as to the proper arrangement and completion of the premises for use as contemplated. We are inclined to agree with the learned trial court, however, that the evidence preponderated in respondents' favor on this question. There was evidence tending strongly to show that the kitchen was so arranged and constructed that it was not properly ventilated, and for that reason could not be used as a kitchen. Two city inspectors testified, in substance, that it was not properly ventilated, and for that reason in its present condition a restaurant would not be permitted there by the city authorities. There was also evidence tending to show that the premises were incomplete in other respects, though this was not of such a serious nature as the want of ventilation. The evidence also fails to show an acceptance of the premises by respondents. We are of the opinion that the findings are fully warranted by the evidence.

It is further contended by counsel for appellant that it is entitled to recover regardless of the fitness of the premises for the purpose respondents intended to use them. In support of this contention counsel invoke the general rule that, upon the demise of premises, there is no implied warranty as to their fitness for the purpose for which they are leased, citing Jones, Landlord and Tenant, § 574, and 24 Cyc. 1047. We have seen that it was not contemplated by either party that this

basement was to be used by respondents in the condition it was then in; but it was, by the terms of the lease, to be arranged by appellant for a cafe and kitchen, and respondents were, by the terms of the lease, prohibited from using the premises, "for any other purpose than that of a cafe or other incidental purpose connected with the business of running a hotel." It may be well to state here that respondents were already tenants of the building above the basement, where they were conducting a hotel. In view of these provisions in the lease, and the circumstances surrounding its making, we do not think that the appellant can escape its obligation to complete the arrangement of the premises as contemplated by invoking the general rule of law above noticed. We are of the opinion that there was a warranty on the part of appellant to make the premises reasonably suitable and fit for a cafe and kitchen; and that until that was done respondents were under no obligation to accept the premises and pay rent therefor. *Hunter v. Porter*, 10 Idaho 72, 86, 77 Pac. 434.

It is further contended that under the terms of the lease appellant was the sole judge of the sufficiency of the arrangement of the premises it was to make. We are not able to give to the contract this construction. The language is, "The lessor agrees to arrange the west basement room, as in its judgment shall be best, for a cafe, and arrange the east room for kitchen." It may well be doubted that appellant's judgment can govern as to the kitchen arrangement under this language; but conceding that such is the case, we do not think, in view of this language, together with the prohibition against respondents using the place for any other purpose than that which it was to be arranged for, means that appellant was to be the sole judge of the fitness of it for that purpose. Conceding that its judgment may control as to the manner of doing the work, the plan, and even the means of ventilation, it does not follow that appellant is not obligated to produce the results contemplated, as it is found to have failed in doing.

One of the grounds of appellant's motion for new trial was its alleged surprise at the testimony of the two city inspectors of the health department to the effect that the place was not suitable for use as a cafe and kitchen, and that its use for that purpose would not be permitted while in that condition. Affidavits were presented showing that appellant could, upon a new trial, produce evidence contradicting this testimony. This testimony was clearly within the issues shown by the pleadings. Appellant could no more claim legal surprise at this testimony than it could so claim as to any other testimony material to the issues. It is not claimed that respondents by any act or word led appellant to believe that testimony of this nature would not be used by them upon the trial. It is difficult to see how the mere introduction of testimony material to the issues disclosed by the pleadings can ever be a legal surprise to an opposing party. *Wilson v. Waldron*, 12 Wash. 149, 40 Pac. 740; *Friedman v. Manley*, 21 Wash. 43, 56 Pac. 832. This was not good ground for a new trial. Another ground assigned for new trial was newly discovered evidence. Assuming that this evidence is other than merely cumulative, the learned trial court evidently regarded it as not of sufficient consequence to likely change the result. We think the court did not abuse its discretion in denying the motion as to this ground, especially since the facts were determined by the court instead of a jury.

We conclude that the judgment should be affirmed. It is so ordered.

RUDKIN, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 8959. Department One. December 6, 1910.]

THE STATE OF WASHINGTON, *on the Relation of C. H. Rowland et al., Appellant*, v. SEATTLE BASEBALL ASSOCIATION *et al., Respondents.*[1]

ASSOCIATIONS—MEMBERSHIP—EXPULSION—NOTICE—NECESSITY. A league of baseball clubs or associations acts without jurisdiction in the expulsion of a member without notice and an opportunity to be heard; and the presence of the member without previous notice of the action does not confer jurisdiction, when such member does not consent.

ASSOCIATIONS—MEMBERSHIP—EXPULSION—BY-LAWS—REPEAL. A section in a constitution of a league of baseball clubs or associations providing that the membership of a club may be terminated by a unanimous vote of the remaining clubs, while only a by-law, is not repealed by a resolution amending a one-year franchise granted by resolution so as to grant a franchise or membership for the term of five years; there being no reference to the constitution, and nothing to show that the resolution was unanimous.

ASSOCIATIONS—MEMBERSHIP—TERMINATION. A baseball club may be deprived of its membership in a league under a clause in the constitution providing for the expulsion of a club on the unanimous vote of the other members if for business reasons the same appears desirable.

ASSOCIATIONS—MEMBERSHIP—REINSTATEMENT—MANDAMUS—WHEN LIES. Where the membership of a baseball club in a league was illegally terminated without giving required notice, the courts will not by mandate enforce its reinstatement where it appears that it will be expelled on due notice, under a clause in the constitution authorizing such expulsion for business reasons, by a unanimous vote of the remaining members.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 11, 1910, denying an application for a writ of mandamus, after a hearing upon affidavits. Affirmed.

Bridges & Bruener, for relators.

Robertson & Miller, *Cohn, Rosenhaupt & Blake*, and *Arthur E. Griffin*, for respondents.

[1]Reported in 111 Pac. 1055.

Gose, J.—This is an appeal from an order denying a writ of mandate, after a return to a show-cause order and a hearing upon the merits. The appellants are respectively the officers and trustees of the Aberdeen Baseball Association, an unincorporated club, having a large membership consisting of the citizens of the city of Aberdeen. The respondents, the Seattle Baseball Association, Spokane Recreation Company, and Vancouver Baseball Club, are corporations. The respondents George Schroeder, John Doe, and Richard Roe, are members of the Tacoma Athletic & Baseball Association, an unincorporated club. The Seattle, Spokane, Tacoma, and Vancouver associations are members of the Northwestern League of professional baseball clubs, an unincorporated association hereafter called the league. Prior to January 18, 1910, the Aberdeen club was also a member of the league. Section 8 of the constitution of the league provides that, "The membership of any club may be terminated . . . by a unanimous vote of the remaining clubs, if for business reasons such membership shall no longer be desirable." On June 23, 1908, at a special meeting of the directors of the league, the several clubs being represented, the following resolution was passed and entered in the minutes:

"Resolved, That the Butte Baseball Club for the City of Butte, the Spokane Recreation Company for the City of Spokane, the Tacoma Athletic & Baseball Association for the City of Tacoma, the Seattle Baseball Association for the City of Seattle, the Aberdeen Baseball Club for the City of Aberdeen and the Vancouver Baseball Club for the City of Vancouver, be, and they are hereby, granted membership in this Northwestern League of professional baseball clubs, or franchises therein, from and after the 1st day of October, 1908, and the president is hereby directed to forward a certified copy of this resolution to each of said parties."

On the 6th day of February, 1909, at a special meeting of the league, the resolution quoted was amended by inserting the words "for five years," immediately preceding the words "from and after the 1st day of October." In the latter part

of the year 1908, a club in Portland, Oregon, was substituted for the Butte club, and given membership for the period of one year.

On January 10, 1910, the president of the league addressed a letter to the president of the Aberdeen club, notifying him that there would be a special meeting of the directors of the league at the city of Seattle on January 18, 1910, "for the purpose of selecting a city to fill the vacancy caused by the withdrawal of the Portland club," and specifying the place where and the hour when the meeting would be held. One of the objects of the league is "to establish and regulate the professional baseball championship of the territory of the Northwestern League." The board of directors of the league consists of the president and one representative from each club, chosen at the annual meeting. The constitution of the league provides that "special meetings may be called by the president of the league." It further provides that section 8, which we have quoted in part, "shall not be altered or amended except by a unanimous vote of this league." At the meeting held January 18, 1910, without notice other than the one we have set forth, the membership of the Aberdeen club in the league was terminated for business reasons, by the unanimous vote of the remaining clubs. The president of the Aberdeen club was present at the meeting, but protested against the action taken, insisting that the action of the league was not within the notice, and demanded a few days for consultation with the other members of his club. He also insisted that he could find a team to take the place of the Portland club.

The record discloses that baseball is a competitive game, and that, unless there are an even number of clubs in the league, there will at all times be one club that is not playing; that, when Portland withdrew, there remained only five clubs in the league; that it was impossible to get another club to take the place of Portland on terms that would be satisfactory to the clubs other than Aberdeen, or upon terms compatible

with business considerations; that business reasons demanded that the membership of one of the clubs should be terminated, and that from an earning standpoint Aberdeen was the least desirable, and its membership was therefore terminated. The evidence discloses that, when the membership of the Aberdeen club was terminated, it had paid and obligated itself to pay a considerable sum of money for players for the season of 1910. The club was not self-supporting, but was kept up by the voluntary subscription of the enterprising citizens of the city of Aberdeen.

The respondents' first contention is that mandamus does not lie in this class of cases, and that the appellants must find their remedy, if they have any, in an action for damages. Assuming, without deciding, that the remedy invoked by the relators is a proper one, if they have been illegally deprived of their membership in the league, we pass to a consideration of other questions, which we think are controlling.

We think that it is fundamental that where a special meeting is called by an organized body, reasonable notice of the time, place, and object of the meeting must be given, and that no business can be transacted that is not specified in the notice, unless all members are present and give their consent. We think this is the rule, regardless of whether the by-laws of the body require such notice. A proceeding to terminate a membership in a club is an adversary proceeding and notice and an opportunity to be heard on the particular inquiry must be given. Otherwise the body acts without jurisdiction. 4 Cyc. 308; 7 Thompson, Corporations, § 881; 3 Am. & Eng. Ency. Law (2d ed.), 1073; *State ex rel. Cicoria v. Corgiat*, 50 Wash. 95, 96 Pac. 689.

In *Von Arx v. San Francisco Gruetli Verein*, 113 Cal. 377, 45 Pac. 685, it was held that the presence of a member who was expelled without previous notice did not confer jurisdiction, unless he consented to the proceeding. A like rule was announced in *Byram v. Sovereign Camp W. O. W.*, 108 Iowa 430, 79 N. W. 144, 75 Am. St. 265. See, also, *Dubcich v.*

Grand Lodge, 33 Wash. 651, 74 Pac. 832. It follows that the removal was illegal.

The appellants next contend that the constitutional provision which we have quoted, conferring authority upon the league to terminate the membership of the club, is in fact only a by-law, and that it was repealed by the amendment to the resolution giving the several clubs a membership for the period of five years, and that no power of removal exists in the league. We acquiesce in the view that the constitutional provision is only a by-law, but we do not think that it was either amended, repealed, or waived: (1) because the constitution provides that the section set forth cannot be altered or amended except by a unanimous vote of the league, and the minutes do not show that the vote conferring membership for five years was unanimous; and (2) because there is no reference in the resolution to the constitutional provision, and it is apparent that there was no intention to change it. The term of membership was intended to be, and is, subject to the removal clause in the constitution. We think this is a sound construction. When the amendment to the resolution was passed, Portland had been substituted for Butte and had been given membership for one year. It was apparent to the league that, when Portland's membership expired, there would remain but five clubs, that it might not be able to secure a sixth club upon satisfactory business terms, and that it was impracticable to have a membership of five clubs.

We think, under the constitution, the league had the power to terminate the membership, upon giving reasonable notice that it desired to do so. It did not give the notice, and its acts were therefore illegal. It does not follow, however, that we should direct the league to reinstate the Aberdeen club. A careful reading of the record discloses that such an order would serve no useful purpose. The league could, and doubtless would, upon reasonable notice, terminate its membership in pursuance of its constitutional right. It cannot, except at great financial loss, operate with an odd number of teams.

From a financial standpoint, the Aberdeen club was the least desirable. The writ "will not lie to compel such admission to a corporate franchise, when it is plainly apparent that the applicant, if admitted, will be immediately expelled, such a case being regarded as an eminently proper one for the exercise of judicial discretion by withholding the writ." High, Extraordinary Legal Remedies (3d ed.), § 287.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, and PARKER, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 8767a. Department One. December 6, 1910.]

JOHN BLUHER *et al.*, *Appellants*, v. MICHAEL EARLES *et al.*, *Respondents*.[1]

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence and in instructions to the jury cannot be complained of by the plaintiff where the jury resolved all the issues in favor of the plaintiff.

DAMAGES—PERSONAL INJURIES—INADEQUATE DAMAGES. A verdict for $100 damages from an explosion of dynamite should not be set aside as inadequate, where the only permanent injury sustained was the perforation of the left ear drum producing defective hearing on that side, the plaintiff did not consult a doctor for nine months, and then took no treatment when he might have been cured, and there is nothing to indicate prejudice.

Appeal by plaintiff from a judgment of the superior court for King county, Gay, J., entered March 19, 1910, upon the verdict of a jury rendered in favor of the plaintiff for $100 damages for personal injuries sustained through an explosion. Affirmed.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for appellants.

Kerr & McCord, for respondents.

[1]Reported in 111 Pac. 1057.

MOUNT, J.—The appellant brought this action to recover damages for personal injuries, alleged to have been caused by the careless explosion of a quantity of dynamite in the possession of an employee of respondents. After issues joined, the cause was tried to the court and a jury. A verdict was rendered in favor of the plaintiff for $100 damages. Plaintiff was not satisfied with the verdict, and moved for a new trial. This motion was denied, and a judgment was entered upon the verdict. Plaintiff has appealed.

It appears, that the plaintiff was in the employ of the Hanford Irrigation and Power Company, as a rodman in the engineering corps; that the respondent Cascade Construction Company had taken the contract to construct a dam in the Columbia river, near Priests Rapids, for the Hanford Irrigation and Power Company; that in this work dynamite was used, and a man named Johnson had charge of this dynamite for the construction company. It was a part of the plaintiff's duties to go to the work upon the dam, and ascertain the number of men employed there upon certain days. On February 12, 1908, the plaintiff went to the work to ascertain the number of men working there that day. He was waiting for Johnson to give him the number of men. While doing so, he went to a large rock where a quantity of dynamite had been placed near an open fire to be thawed. While the plaintiff was there, Mr. Johnson came up and attempted to rekindle the fire by pulverizing some dynamite and placing it upon some embers. The result was an explosion of a quantity of the dynamite which killed Johnson and injured the plaintiff. It is argued by the appellant that the court erred in admitting evidence to the effect that Johnson was a competent and careful powderman, and that the respondents had used due care and made inquiries as to his competency before employing Mr. Johnson; and that the court also erred in instructing the jury to the effect that, if they found that respondents had used diligence in the employment of Johnson

and in the selection of the place used for thawing dynamite, and that the place selected was not ordinarily dangerous, and if they believed that the plaintiff, without any necessity therefor, had gone to the place, and had been injured through the negligence of the powderman, no recovery could be had.

If this evidence was erroneously admitted, and if the instruction was erroneous, such errors were harmless because the jury found a verdict in favor of the plaintiff. In this same connection the court told the jury that, "if you believe from the evidence that the deceased Johnson, in a wilful manner and without giving any opportunity, and for the purpose of doing a wrongful act, . . . did kindle fire with dynamite, and that the plaintiff had no reasonable opportunity to escape, and that injury thereby came to the plaintiff, then your verdict should be for him in compensatory damages." The jury must have found either that Johnson was a careless man, which was known to respondent, or that he wilfully kindled the fire with dynamite and injured the appellant, and therefore concluded that the appellant was entitled to damages, which were awarded. The evidence and instruction upon the question of the competency of the powderman, therefore, are of no importance in the case at this time.

It is also argued that the verdict is manifestly inadequate, and that the court should therefore have granted a new trial. A careful reading of the evidence does not convince us that the verdict is inadequate. The only permanent injury shown is a perforation of the left ear drum and a discharge therefrom, which probably produce defective hearing on that side. After the injury the appellant continued his employment for several months. He did not consult a doctor for nine months after the injury, and then, when it might have been cured, he took no treatment. The jury saw the appellant, heard him testify, and were much better able to judge of his injury than we are. There is nothing in the case to

indicate any prejudice against the appellant, and there is nothing to justify a reversal.

The judgment is therefore affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and PARKER, JJ., concur.

[No. 8868. Department Two. December 7, 1910.]

G. F. HESSELGRAVE, *Respondent*, v. SAMUEL GINNETT *et al.*, *Appellants*.[1]

PRINCIPAL AND AGENT—COMPENSATION—EVIDENCE—SUFFICIENCY. In an action for the services of an agent, the defense that the agent was to build bunkers costing $7,000, for the unloading of scows, is not made out where the testimony was vague, the agent could have been discharged at any time, and appears to have been discharged for other reasons.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered December 9, 1909, upon findings in favor of the plaintiff, in an action for an accounting. Affirmed.

Craven & Greene, for appellants.

Abrams & Shamel, for respondent.

RUDKIN, C. J.—For some time prior to the 23d day of July, 1908, the defendants, as copartners under the name and style of Whidbey Island Sand & Gravel Company, owned and worked sand and gravel pits on the island of that name. On the 12th day of May, 1908, a contract was entered into between the plaintiff and the defendants, under the terms of which the plaintiff was employed as agent for the defendants, to procure orders for and make sales of their product in the city of Bellingham and vicinity, superintend the unloading of scows, the delivery of sand and gravel, the making of collections, etc. In the beginning, and as long as the plaintiff remained in the employ of the defendants, the scows

[1]Reported in 111 Pac. 1064.

were landed or delivered on a gridiron at the end of Chestnut street, on the west side of the waterway in the city of Bellingham, from which the scows were unloaded under the supervision of the plaintiff. A portion of the sand and gravel delivered under the contract was taken directly from the scows by customers, but by far the greater portion was unloaded by the plaintiff. Material taken from the scows was to be sold for ninety cents per cubic yard, while that unloaded by the plaintiff was to be sold for one dollar per cubic yard. For sand and gravel unloaded from the scows by customers, the defendants were to receive fifty cents per cubic yard, and the remaining forty cents was to be divided equally between the plaintiff and the defendants. For sand and gravel unloaded by the plaintiff the defendants were to receive fifty cents per cubic yard for the material, the plaintiff ten cents per cubic yard for unloading, and the remaining forty cents per cubic yard was to be divided equally between the plaintiff and the defendants.

A corporation of the same name as the copartnership succeeded the copartnership in the latter part of July or early in August, and on or about the 23d day of September, the plaintiff was discharged and the corporation took charge of the business in the city of Bellingham on its own account. During the time the plaintiff was in charge at Bellingham, forty-eight scow loads of sand and gravel in all were delivered and sold, and the present action was instituted against the copartnership for an accounting, and to recover the balance due to plaintiff for commissions, etc. The case was tried before the court without a jury, and from a judgment in favor of the plaintiff, the defendants have appealed.

One of the principal contentions of the appellants is that the respondent agreed to procure a site for and construct bunkers with a capacity of 500 cubic yards, at the city of Bellingham, to aid in receiving the sand and gravel, unloading it from the scows, and reloading it on wagons for delivery, and that he failed and refused to comply with this part of his

contract. The court below found against this contention, and we think properly so. The parties agreed in the first instance that the scows should be delivered on the gridiron, and the testimony is very vague and uncertain as to the time when the bunkers were to be constructed or completed. The respondent was only employed during the pleasure of the appellants, and it seems unreasonable that he should be expected to go to an expense of $7,000 for constructing bunkers, when he might lawfully be discharged even before the bunkers were completed. Furthermore, it seems clear to us that the contract of employment was terminated and the respondent discharged for other and different reasons.

The next contention is that during a part of the period for which a recovery is sought the respondent was in the employ of the corporation. The court properly found against this contention also. Even the appellants themselves did not know definitely when they ceased to transact business as a copartnership and became a corporation, and how could the respondent know? The testimony shows clearly that the respondent was employed by the copartnership, and that he never agreed to become the servant of the corporation. Again, we think, the testimony clearly shows that the understanding of all parties concerned was that there should be no change in their relations until the corporation took charge at Bellingham after the discharge of the respondent. The court below awarded to the respondent the cost of the gridiron constructed for the purpose of receiving the scows, and we think such was clearly the agreement of the parties at the time the respondent was discharged.

The remaining questions go to the quantity of sand and gravel delivered, the amount received by the appellants, the cost of hauling, and many other items of small importance. Upon these issues the testimony was indefinite and uncertain, resulting chiefly from loose business methods and imperfect bookkeeping, but the case was very carefully tried and fully considered in the court below, and we are convinced that its

conclusion is as nearly correct as the circumstances of the case will admit of. The judgment is therefore affirmed.

DUNBAR, CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 9083. Department Two. December 7, 1910.]

JESSE B. HAWLEY, *Appellant*, v. BONANZA QUEEN MINING COMPANY, *Respondent*, O. L. LEE, *as Receiver etc. et al.*, *Defendants*.[1]

CORPORATIONS—DISSOLUTION—ACTIONS—ABATEMENT AND REVIVAL. An action, whether at law or in equity, against a corporation abates upon the loss, *pendente lite*, of its franchise by having its name stricken from the records of the secretary of state for failure to pay its annual license fee, pursuant to Rem. & Bal. Code, § 3715, and failure to apply for a reinstatement pursuant to Id., § 3715a, where its receiver or trustees are not substituted as parties.

CORPORATIONS—DISSOLUTION—LICENSE FEES—CONSTITUTIONAL LAW—LEGISLATIVE POWER—ENCROACHMENT ON JUDICIARY. Rem. & Bal. Code, § 3715, providing that the names of corporations shall be stricken from the records of the secretary of state, and the corporation dissolved for failure to pay the annual license fees unless reinstated, under § 3715a, is not unconstitutional on the theory that a forfeiture of corporate franchises cannot be decreed except by a court of competent jurisdiction.

SAME—CONTRACT RIGHTS—PARTIES—CREDITORS. Rem. & Bal. Code, §§ 3715 and 3715a, providing for the forfeiture of corporate franchises for the nonpayment of annual license fees violates no contract rights of creditors of the corporation; since they are not parties to the contract between the state and the corporation or its stockholders, and still have a remedy against its assets.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered April 2, 1910, abating an action against a corporation upon suggestion that it had been dissolved. Affirmed.

Merrick & Mills, for appellant.

Bell & Anderson, for respondent.

[1]Reported in 111 Pac. 1073.

RUDKIN, C. J.—This action was instituted against the Bonanza Queen Mining Company and others, to foreclose certain liens for labor performed in and about the company's mines. The defendants, other than the mining company, were not served with process and made no appearance in the action. The mining company answered to the merits, but when the case was called for trial its counsel suggested to the court that since the commencement of the action the company's name had been stricken from the records of the office of the secretary of state, pursuant to chapter 140, of the Laws of 1907, page 270 (Rem. & Bal. Code, § 3715), for failure to pay its annual license fee for the period of two years; that it had not applied for reinstatement within the time prescribed by chapter 19 of the Laws of Extraordinary Session of 1909, page 57 (Rem. & Bal. Code, § 3715a); that the time for making such application has expired, and that the corporation was thereby dissolved. This suggestion was accompanied by a certificate from the secretary of state showing the foregoing facts. Upon this suggestion of counsel and the accompanying proofs, judgment was entered abating the action as to the mining company, from which this appeal is prosecuted.

"The complete dissolution of a corporation destroys its capacity to be sued at law because a judgment can no more be rendered against a dead corporation than against a dead man.

"It cannot thereafter be made a party defendant in an action brought by a receiver to set aside a fraudulent conveyance of its assets.

"The necessary effect of the dissolution of a corporation is to abate all actions pending against it at the time of its dissolution, in the absence of a saving statute providing for the continuation of such actions.

"Decisions are sometimes met with which hold in general terms a doctrine opposed to that just stated. Thus according to an early decision in Missouri the expiration of the charter of a corporation does not affect legal proceedings already commenced against it. It is enough to say of such

decisions that unless they can be justified by some local statute they were badly decided.

"It follows that a judgment rendered against a corporation after it has been dissolved is voidable, in the sense that it will be reversed on error, or that the execution of it will be perpetually enjoined.

"Other authoritative courts have gone to the length of holding that a judgment rendered against the corporation after its dissolution, although in an action previously commenced, is not merely erroneous, but absolutely void." 10 Cyc. 131 *et seq.*

In *National Bank v. Colby*, 88 U. S. 609, Mr. Justice Field said:

"With the forfeiture of its rights, privileges, and franchises the corporation was necessarily dissolved, as the decree adjudged. Its existence as a legal entity was thereupon ended; it was then a defunct institution, and judgment could no more be rendered against it in a suit previously commenced than judgment could be rendered against a dead man dying *pendente lite*. This is the rule with respect to all corporations whose chartered existence has come to an end, either by lapse of time or decree of forfeiture, unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution. The prolongation of the corporate life for this specific purpose as much requires special legislative enactment as does the original creation of the corporation. No such enactment is found in the act of Congress authorizing the creation of National banks and prescribing their powers, nor is there any provision elsewhere that we are aware of which would prevent the dissolution of a corporation from working the abatement of a suit pending against it at the time.

" 'I cannot distinguish,' says Story, in *Greeley v. Smith*, 3 Story 658, 'between the case of a corporation and the case of a private person dying *pendente lite*. In the latter case the suit is abated at law, unless it is capable of being revived by the enactment of some statute, as is the case as to suits pending in the courts of the United States, when, if the right of action survives, the personal representative of the deceased party may appear and prosecute or defend the suit. No such provision exists as to corporations, nor, indeed, could exist without reviving the corporation *pro hac vice*, and,

therefore, any suit pending against it at its death abates by mere operation of law.' "

The appellant contends that this rule does not obtain in equity, but we apprehend that a defendant to proceed against is just as essential in one court as in another, except where the proceedings are strictly *in rem*. In actions to foreclose mortgages or liens on real property the owner of the property is a necessary party defendant, and if he dies during the pendency of the action his heirs or successors in interest must be brought in. The same rule applies of necessity to a defunct corporation. Had the receiver been served in this case, the action might have proceeded to judgment against him, notwithstanding the dissolution of the corporation; or the trustees, in whom title vests upon dissolution, might have been substituted as defendants, but nothing of that kind was done or attempted. The appellant persisted in his right to proceed against the corporation notwithstanding its dissolution, and the court had no alternative but to abate the action.

It is next contended that the acts of 1907 and 1909, *supra*, which provide for the dissolution of corporations failing to pay their annual license fees, or to apply for reinstatement within a limited time, are unconstitutional and void, because a forfeiture of corporate franchises can only be decreed by a court of competent jurisdiction. This position is untenable. A corporation is a mere creature of the law, and the privilege of being and acting as a corporation is contingent upon a compliance with the law. The appellant concedes that it was competent for the legislature to provide for the dissolution of corporations failing to pay their annual license fees, but contends that the forfeiture can only be declared after a hearing in some court of competent jurisdiction. This question was ably reviewed in all its aspects by the supreme court of California in the recent case of *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341, where a similar act of that state was sustained. In any proceeding to enforce the forfeiture already accrued, it would doubtless be competent

for the corporation to show that it was exempt from the provisions of the act imposing the license fee, or that the fee had in fact been paid, but no such question is presented here. On the contrary, the fact of dissolution is asserted in behalf of the corporation itself.

It is further contended that these several acts violate some contract rights of the appellant, but this claim is equally unfounded.

"The repeal of a charter is not an infringement of any constitutional right, where the power has been reserved by the legislature, although the effect of it is, as in other cases, to abate actions against the corporation; since this merely restrains the creditor who is the plaintiff in the action from prosecuting his demand to a judgment at law and thereby obtaining an advantage in the distribution of the assets over other creditors. In common with the others he still participates in the distribution; and hence, the effect of the legislative repeal is not to destroy but merely to change his remedy against the corporation." 10 Cyc. 1273.

To whatever extent a corporate franchise may constitute a contract between the state and the corporation or its stockholders, it has never been held that creditors of the corporation are parties to that contract.

The judgment of the court below is therefore affirmed.

CHADWICK, DUNBAR, CROW, and MORRIS, JJ., concur.

[No. 9002. Department Two. December 7, 1910.]

FLOYD DUKETTE, *Respondent*, v. NORTHWESTERN WOODENWARE COMPANY, *Appellant*.[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—PLEADING—FACTORY ACT. In an action for personal injuries under the factory act, an answer pleading assumption of risks is properly struck out, where the special circumstances relied on as an exception to the rule that assumption of risks is no defense, were not pleaded in the answer, nor disclosed by the complaint.

SAME—ASSUMPTION OF RISKS—FACTORY ACT—EXCEPTIONS—QUESTION FOR JURY. Special facts making an exception to the rule that assumption of the risks is no defense to an action for personal injuries, brought out only in the evidence, and resolved by the jury against the appellant on conflicting testimony, furnish no ground for reversal.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The question of contributory negligence of a rip sawyer in adopting an unsafe method of removing waste from a chute, by putting an arm down through the top of the table near the saw, is for the jury, where there was a dispute as to whether an iron rod had been provided for that purpose, and whether such rod could be used advantageously.

MASTER AND SERVANT—SAFE TOOLS—GUARDING MACHINERY—NEGLIGENCE—QUESTION FOR JURY. The negligence of the owner of a rip-saw in failing to guard the lower end of the saw under the table is for the jury, where there was a dispute as to whetner it was practical to do so, and whether a sawyer in the discharge of his ordinary duties in cleaning out the chute in the ordinary way was liable to come in contact with it.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,934, reduced to $3,000 by the trial court, is not excessive, where the plaintiff sustained a serious injury to his arm whereby he suffered much pain, spent $150 for doctor's fees, and was unable to follow his vocation for about fifteen months, and his earning power was three dollars a day.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered February 25, 1910, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained by an employee in a factory. Affirmed.

[1]Reported in 111 Pac. 1065.

James B. Murphy and *Murphy & Winders* (*M. M. Richardson*, of counsel), for appellant.

Hayden & Langhorne, for respondent.

Morris, J.—Respondent brought this action under the factory act, to recover for injuries sustained by coming in contact with an unguarded ripsaw. Judgment was awarded him upon verdict, and defendant appeals.

The errors assigned are; sustaining a demurrer to an affirmative defense, denial of nonsuit and judgment, refusal to give requested instructions, error in those given, and that the verdict was excessive. The complaint clearly stated a cause of action under the factory act. The affirmative defense, to which a demurrer was sustained, pleaded assumption of risk. It has been the rule in this state, since *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915, that assumption of risk is not a defense, where the cause of action shows a violation of the factory act. This is admitted by appellant, but it contends there were special circumstances in this case which took the case out from the above rule. These special circumstances arise out of its contention as to the manner and cause of the injury disclosed, as it contends, by the evidence; and its further contention of how it might have been avoided, and respondent's failure to show ordinary care in this particular. None of these matters were disclosed in the complaint. It was therefore apparent that, as to the cause of action pleaded, the affirmative defense ruled against was not applicable. It was therefore properly stricken. In so far as we are now asked to revive the defense and apply it to the evidence which appellant contends should determine the issues involved, we need only say these contentions arise from the evidence, from the facts appellant claimed to be established, in which contention it is disputed by respondent as to the true situation disclosed by the testimony. It was therefore a question of fact for the jury, and we cannot disturb their verdict, assuming

we might differ with them, if the question were properly submitted to them.

The facts surrounding and contributing to the injury were these: The ripsaw was installed on the second floor of the building, the sawdust and refuse from it being carried down through the first story by a waste chute leading to a conveyor underneath the building. There were several of these saws, each having a separate chute which extended to and connected with one main chute which conveyed the refuse from the separate chutes to the conveyor. The mouth of the main chute occupied the space under the frame of respondent's saw; it was rectangular in shape, and became fan-shaped as it emerged from underneath the saw in the rear of the frame. As it projected downward to the conveyor, the fan-shaped portion gradually tapered until it met the conveyor. These chutes were frequently clogged with waste material, and it then became necessary for some one to go down beneath the floors and dislodge the waste so that it would fall into the conveyor. Appellant contends that it had provided a long iron rod, and a long stick with a hook on, for the purpose of loosening this waste from above with safety. But appellant and respondent do not agree as to whether the iron rod was there at the time of the accident, or whether it and the long stick could be used advantageously in what respondent was attempting to do at the time of his injury. There is also a difference of opinion as to whether the chute could be cleaned effectually by the use of the stick alone, or if it could be done while standing at the rear of the table, on account of the length of the handles and the nearness of the wall. So that it was a question of fact for the jury to determine as to whether or not there was a safer or better way to do what respondent was attempting to do at the time of his injury, failure to adopt which would be contributory negligence.

There was also a difference of opinion between the witnesses as to the use of this rod or stick, and the customary and ap-

proved method of cleaning out the small chute. This ripsaw and its gear were enclosed by a frame, the saw extending about one-third of its diameter above the frame. Upon this frame was a carriage sliding back and forth parallel to the saw upon which the boards to be ripped were placed; it was adjustable and could be lifted up when desired. At the time of his injury, respondent had gone down stairs to loosen up the clogged chute and start the conveyor. All of the waste in the chute fell down except some sticks, which lodged and failed to come through the floor underneath the saw, thus preventing the sawdust above the floor from coming down. He then went up stairs, and lifting the carriage, took a stick and commenced jabbing downward through the sawdust to loosen the sticks. In doing so he thrust his arm into the space between the tracks on which the carriage ran. There was a strip three inches thick to the left of this space and separating it from the saw, about three inches to the left of the strip. While endeavoring to loosen the sticks, with his arm thrust into this space nearly to his shoulder, he says his "arm slipped through the sawdust" and came in contact with the lower end of the saw.

Appellant contends no duty was imposed upon it to guard the lower end of this saw which, coming in contact with respondent's arm, produced the injury. The answer to this contention necessarily depends upon whether there was danger of the employees' coming in contact with the saw while in the discharge of their ordinary duties, and whether respondent in attempting to clean out the upper chute in the manner in which he did, was pursuing the ordinary method of doing the work and the only way it was practical to accomplish it, and whether such clogging with such means of overcoming it was such an ordinary event in the operation of the saws that appellant should have taken due notice thereof and guarded the saw. These were all questions of fact for the jury, as was the other contention of appellant that the lower end of the saw could not be advantageously guarded. *Thomson v.*

Issaquah Shingle Co., 43 Wash. 253, 86 Pac. 588; *Gustafson v. West Lumber Co.*, 51 Wash. 25, 97 Pac. 1094; *Rector v. Bryant Lumber, etc. Co.*, 41 Wash. 556, 84 Pac. 7.

This disposes of the assignment of error as to nonsuit, contributory negligence, and motion for judgment. In so holding, we are not unmindful of our holding in *Laidley v. Musser Lumber & Mfg. Co.*, 45 Wash. 239, 88 Pac. 124, cited by appellant. In that case, so far as the record goes, the act was an independent one, not connected with the ordinary discharge of the employee's duty. Nor was the plaintiff there following out a usual and ordinary method of procedure, nor one which the master had any reason to believe the servant would attempt. In the case before us, there was evidence from which the jury could answer these questions against appellant's contention, and this is, we think, a distinguishing feature between the two cases. We find no error in the matter of instructions, either as to those given or in the refusal to give others. Neither, under the circumstances, can we say that the judgment reduced by the court below from a verdict of $3,934 to $3,000, is excessive. The injury to the arm was a serious one. The respondent was unable to follow his ordinary vocation for about fifteen months. His earning power was three dollars a day. He suffered much pain. He expended $150 for physician's services. He paid hospital bills, etc. We can adopt no scale to figure out a just award under such circumstances. We can only disturb the verdict when it appears grossly excessive. We cannot say in this instance it is.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, DUNBAR, and CROW, JJ., concur.

[No. 9118. Department Two. December 7, 1910.]

ALBERT JOHNSON, *Appellant*, v. AUGUST ANDERSON *et al.*, *Respondents*.[1]

EXPLOSIVES—BLASTING—CONTRIBUTORY—NEGLIGENCE. A nonsuit is properly granted where plaintiff, a man of experience with explosives and blasting, had warning of a blast and after taking up a place of safety by a tree, left the same and came out in the open, relying upon his ability to watch and dodge the flying rocks.

EVIDENCE—OPINION EVIDENCE—EXPERTS—BLASTING. In blasting work, the feasibility of preparing a barricade to protect the workmen is not a matter of expert proof.

EXPLOSIVES—WARNING—EVIDENCE OF CUSTOM—ADMISSIBILITY. The custom of giving warning of a blast is properly excluded as immaterial, where plaintiff received adequate warning.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 18, 1910, in favor of the defendant, dismissing an action for personal injuries, upon withdrawing the case from the consideration of the jury. Affirmed.

Robert A. Devers and *Milo A. Root*, for appellant.

C. H. Winders, for respondents.

MORRIS, J.—Appellant was injured by being struck by a falling rock, thrown by a blast of powder exploded by employees of respondents, while constructing a road along the Solduc river, in Clallam county. Appellant had been working for respondents for some time as a subcontractor or station man, in the grading and construction of the road. He had completed the work given him at one of the camps, and on the morning of his injury had come up to another camp preparatory to taking more station work. He arrived in the camp about ten o'clock, and on his way saw the men working at the place where the blast was fired. About noon, while he was lying on a bunk in one of the camp tents, one of the

[1]Reported in 111 Pac. 1063.

men came to the tent and shouted "Fire," which appellant understood was a warning that a blast was about to be exploded and that all should seek positions of safety. Upon hearing the warning, appellant with the other men sought shelter from the blast. Appellant saw the men coming down the hill from the place where the blast was to be exploded which he says was about five hundred feet away, and knew the general direction from which to anticipate the coming of the rocks and earth thrown by the blast. He also knew two or three minutes would elapse between the warning and the blast in which he might seek a place of safety. The country was wild, and all around the place were windfalls and fallen trees of various sizes. He had been accustomed to blasting in his own work as station man, and had worked about eight years in work of this character. When he first ran from the tent, he stepped behind a tree; then seeing another workman, who he says was a foreman or straw boss, standing out in the open, he left the tree and went and stood beside him and looked up in the direction from which the blast was expected. He says he thought that would be the best place to stand—the safest, as the foreman would know the safest place. He also testifies:

"Q. It is a fact, isn't it, that you as a man who is used to blasting and dealing with powder, feel that you can go out and look and watch the rocks and keep out of their way, isn't it? A. Yes, sir. Q. And quite often when you know a blast is going off that is all you do; is that correct? A. Yes, sir. Q. And that is about what they were doing at the time? A. Yes. . . . Q. But now, in your eight or ten years' experience, Mr. Johnson, in this kind of work, when you know there is going to be shooting, isn't it a fact that you men who understand all about this powder business, you stand out and think you can see the rocks coming and dodge them? A. Yes, sir. Q. (The Court) You say you tried to see some of the rocks come down? A. (Mr. Root) Yes. Q. (The Court) Is that what you said? A. Yes."

At the conclusion of the plaintiff's case, defendants challenged the legal sufficiency of the evidence, and moved for judgment upon three grounds: (1) there was no evidence

to establish negligence of defendants; (2) plaintiff by his own evidence is shown to be guilty of contributory negligence; and (3) that plaintiff in selecting his position of safety assumed the risk. The motion was granted by the court, and plaintiff appeals.

The court was right in granting the motion. Appellant was familiar with the whole situation except as the local surroundings were new to him. When warned of the danger, he sought and found a place of safety. He voluntarily left that place because, with his eight years' experience, he thought he could stand in the open and watch and dodge the flying rocks. In doing so he undertook the burden of his own safety, and assumed the risk of his position. The negligence, if any, which was the proximate cause of his own injury was his own act in assuming he could successfully dodge the flying rocks. These assertions are too plain for argument, and need no discussion.

Further error is predicated upon the court's refusal to permit appellant to prove that it was feasible for respondents to have prepared a barricade to protect the workman from the danger of the blast, and in refusing to admit proof that it was customary to give warning adequate to prevent danger from an expected blast. Both rulings were correct. The first offer was not a matter for expert proof. The second was met by the plaintiff's own testimony, that the customary warning had been given, that he fully understood its portent and the danger to be avoided.

The judgment is affirmed.

Rudkin, C. J., Chadwick, Dunbar, and Crow, JJ., concur.

[No. 9154. Department Two. December 7, 1910.]

JACOB MURKOWSKI, *Respondent*, v. LOUIS MURKOWSKI *et al.*, *Appellants*.[1]

CANCELLATION OF INSTRUMENTS—DEED—FAILURE OF CONSIDERATION—BREACH OF CONTRACT—COLLATERAL. A deed made without fraud, while the grantor was under no disability or infirmity, in consideration of a collateral contract which was in no sense an integral part of the deed, is not to be cancelled for breach of the contract; since enforcement of the contract should be sought at law.

SAME—DEED—CONSIDERATION—COLLATERAL CONTRACT—MISTAKE. Where a deed of a half interest in a blacksmith shop passed between father and son in consideration of a collateral contract for the payment to the grantor of six dollars per week, and the minds of the parties did not meet, one understanding that the money was to be paid for life, and the other only while the grantor worked in the shop, the deed and whole transaction should be set aside.

Appeal from a judgment of the superior court for King county, Kauffman, J., entered June 22, 1910, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to cancel a deed for fraud. Modified.

Faben & Kelleran, for appellants.

Aust & Terhune, for respondent.

CHADWICK, J.—In July, 1898, plaintiff and defendant Louis Murkowski, who will be hereafter referred to as the defendant, operated a blacksmith shop at Enumclaw, King county. Whether they were partners as asserted by plaintiff, or plaintiff was employed by the defendant upon a division of the earnings, is uncertain. About the time their relations began, plaintiff advanced the amount due upon a contract to purchase the three lots which were occupied by the blacksmith shop, and they became equal owners of the land. In the fall of 1907, plaintiff and his wife, the stepmother of defendant, had some trouble over property, plain-

[1]Reported in 112 Pac. 92.

tiff asserting his rights by an action at law or in equity. His wife retaliated by bringing an action for divorce, which was granted. The blacksmith shop—that is, an undivided one-half interest—was decreed to be the property of the plaintiff in his sole and separate right. Thereafter and, as we think the evidence fairly shows, by the mutual understanding and consent of both plaintiff and defendant, and with no contemplated fraud or advantage of the one over the other, but with the intent to defeat any possible chance of the wife and her children by a former marriage sharing in the property set over to plaintiff by the decree, the parties caused a deed, absolute in form, to be prepared, which plaintiff executed, conveying the fee simple title unconditionally to defendant. At the same time a contract in writing was entered into, whereby the defendant, as party of the first part, agreed that he would "pay to the party of the second part the sum of six dollars per week as long as he may live; provided, however, that if the party of the first part should sell his blacksmith shop, then he agrees to pay to the party of the second part the sum of $1,000, and the payment of six dollars per week shall then cease;" and the plaintiff, as party of the second part, agreed to "work for the party of the first part in his blacksmith shop, as long as he is able to perform such work."

On January 18, 1908, plaintiff remarried his divorced wife. From the time the deed and contract were executed, the parties acted thereunder until the summer of 1909, when plaintiff, his wife having in the meantime been informed of the transaction, quit working for defendant, asserting his sickness and inability to work, but demanding the six dollars per week as provided in the contract. Defendant denied his liability unless plaintiff actually worked for him, and in addition thereto asserted plaintiff's health and ability to work. In the due progress of the family row, plaintiff brought this action to set aside the deed as fraudulent. Defendant, answering, denied the alleged fraud, and set up a breach of the contract. The trial judge made no findings of fact, but decreed

that the deed be cancelled as fraudulent; conditioned, however, upon the payment of the sum of $350 by plaintiff into the registry of the court for the use of the defendant. The testimony revealed the fact that defendant had advanced that sum for the benefit of plaintiff in the divorce suit, and the possibility that it was a part of the consideration for the deed. Defendants have appealed.

It is contended by the appellant, and we think correctly, that there was no evidence sufficient to warrant the court in setting aside the deed as a fraud upon respondent. He executed it, knowing its effect, and with full intent to divest himself of the title. He was under no disability or infirmity of mind or body. He made the deed in consideration of the contract, which was collateral and in no sense an integral part of the deed. We think that, where a deed is so made, the remedy is not in equity to cancel the deed, but the enforcement of the consideration must be sought at law. *Ford v. Jones*, 22 Wash. 111, 60 Pac. 48; *Goodrich v. Kimble*, 49 Wash. 516, 95 Pac. 1084; *Florin v. Florin*, 49 Wash. 37, 94 Pac. 658; *Balam v. Rouleau*, 52 Wash. 389, 100 Pac. 833; *McClellan v. O'Conner*, 47 Wash. 121, 91 Pac. 562.

At this point, however, we are met by a fact which seems to us to be evident from a careful reading of the testimony. The minds of the parties did not meet on the effect of the collateral agreement. They made their contract in the Polish language. Respondent speaks English brokenly, while the appellant seems to suffer some impediment of speech. Having made their contract in their own tongue, it was reduced to writing by a scrivener. Appellant believed, and acted upon the belief, that the six dollars a week was to be paid only in the event of labor performed and services rendered by the respondent; whereas respondent believed at the time the contract was executed, that he was to receive the sum of six dollars a week as long as he lived. Both parties seem honest in their belief, and we do not think either of them would have entered into the contract if he had not so understood it. The

whole transaction, deed and contract, may be set aside for this reason, reserving a lien in the sum of $350 on the one-half interest in the property in favor of the appellant.

However, considering the general equities of the case, and the expressed willingness of the respondent to accept the sum of $1,000 if the property had been sold to a third party, and his declaration when a witness in his own behalf that he is willing to take $1,000 in settlement of his claim, we think appellant, who is the owner of an established business upon, as well as an undivided half interest in, the property, should be allowed to retain it if he so desires. Therefore, if, within sixty days after the remittitur goes down, the respondent shall pay into the registry of the court the sum of $1,000, subject to the order of respondent, the title of the property will be confirmed in him. Otherwise, the decree will be modified in that the deed is set aside, but subjecting the property to a lien in favor of appellant in the sum of $350, and providing for its enforcement.

We see no reason, except that the parties are of the same blood and possibly urged on by others who have married into the family, why this controversy should have ever reached the courts, or why either party should pay the costs on appeal.

The case will be remanded, with instructions to enter such a decree as may be necessary to meet these suggestions. Neither party will recover costs in this court.

RUDKIN, C. J., DUNBAR, CROW, and MORRIS, JJ., concur.

[No. 9037. Department Two. December 7, 1910.]

C. R. JONES, *by his Guardian Ad Litem John Jones, Appellant*, v. JOHN C. LESLIE *et al., Respondents.*[1]

PROPERTY—SUBJECTS OF—LABOR. The right of employment in a laboring man is property.

MASTER AND SERVANT—BLACKLISTING—DAMAGES. Damages are recoverable by a servant, where on giving notice to his employer that he was quitting to take a better job, the employer objected, and prevented the servant from securing the other job by notifying the prospective employer not to employ the plaintiff and that if he did so defendant would withdraw his custom and discontinue business relations existing between them.

Appeal from a judgment of the superior court for King county, Gay, J., entered May 31, 1910, dismissing an action for damages for blacklisting, upon withdrawing the case from the consideration of the jury. Reversed.

John E. Humphries and *George B. Cole*, for appellant.

Farrell, Kane & Stratton, for respondents.

DUNBAR, C. J.—C. R. Jones, by his guardian *ad litem* John Jones, complains of the defendants John C. Leslie, Leslie Power Company, Inc., L. S. Winans, and Seattle Cracker & Candy Company, a corporation, and alleges, in substance, that on or about the 12th day of August, 1909, and long before said time, the plaintiff, C. H. Jones, was employed by the defendant Leslie Power Company as a teamster, and was driving a wagon and team for said defendant; that some time prior to the 12th day of August, plaintiff made an oral contract and agreement with Steeves Brothers, who were then in the teaming business in Seattle and who were employed as teamsters by the defendant Cracker Company, to work as a teamster for Steeves Brothers for a stipulated price, for an indefinite period; that on or about the 12th day of August,

[1]Reported in 112 Pac. 81.

1909, the defendants J. C. Leslie and Leslie Power Company, Inc., notified the Cracker Company that, if the Cracker Company permitted Steeves Brothers to employ Jones, the Leslie Power Company would withdraw all its patronage from the Cracker Company and refuse to trade with it further; that the Cracker Company, for the purpose of keeping the plaintiff from being employed by Steeves Brothers, connived, confederated, and conspired together and notified Steeves Brothers that they must not employ this plaintiff as a teamster at all, and caused Steeves Brothers to refuse to employ the plaintiff as a teamster; that the said defendants then and there, wrongfully and unlawfully, and against the rights of plaintiff, blacklisted the plaintiff with Steeves Brothers; that by reason of the things aforesaid, the plaintiff was thrown out of employment, and remained idle from the 12th day of August, 1909, until the 27th day of September, 1909; alleged specific damages.

The answer of all the defendants was practically a denial. On motion, a nonsuit was granted in favor of defendants, L. S. Winans and the Seattle Cracker & Candy Company, and at the close of all the testimony, the court sustained a motion of the defendants J. C. Leslie and the Leslie Power Company for judgment in their favor, and dismissed the case as to all the defendants, entering judgment in their favor and against the plaintiff. From this judgment, this appeal is taken.

The testimony in this case is somewhat conflicting. It will be necessary, therefore, to examine only the testimony of the appellant, plaintiff below, to determine whether or not the court erred in granting the motion of nonsuit. We may state here that we think there was no error of the court in granting the motion in favor of Winans and the Seattle Cracker & Candy Company, as there is no indication of any conspiracy in the case. It seems that the appellant, young Jones, was working for the Seattle Cracker Company and Steeves Brothers; that during the summer vacation he was laid off,

so that some relative who was at home during the vacation could take the job, with the understanding that the appellant should have the advantage of the first opening. He then went to work for the respondent Leslie Power Company, and in time he was notified that he could have work again with Steeves Brothers or the Cracker Company. One of the employees of the respondent Leslie Power Company informed Mr. Leslie, the president and manager of that company, that Jones was going to quit. Mr. Leslie called him in and asked him about it, and he told him that he was going to quit as he had a better job at more wages. Leslie wanted to know of him if he was going to leave him in the lurch, and the appellant told him that he could not give him any more time, that he would commence working for his new employer on Monday the 15th; whereupon Leslie told appellant that, if he left him in the lurch, he would see that he never got the job with the Cracker Company; and he immediately repaired to the telephone and sent the following message to the Cracker Company:

"Question: State what he said over the telephone. Answer: He told him that he thought I didn't do him right. He said that he was a good customer there, and he said 'You know it.' He said, 'If you hire him I will certainly not buy any more crackers from you.' "

Another witness testified to hearing substantially the same message, and there is some evidence from the guardian Jones and a man who was with him that Leslie admitted having tried to injure the appellant for the reason that he had tried to injure him, or as he expressed it, "had done him dirt." The message which Leslie testifies to sending was of a different character, and would probably not be actionable. But the determination of the credibility of the witnesses was a matter resting entirely with the jury. It also appears from the testimony, that the appellant was discharged by Steeves Brothers through the interposition of the Cracker Company, for the reason that they did not want to lose a good customer.

This presents a case here which is purely a question of law. It would be well to remember, in the beginning, that it is fundamental that a man has a right to be protected in his property. This was the doctrine of the common law; is, and always has been, the law in every civilized nation. It is, of necessity, one of the fundamental principles of government, the protection of property being largely one of the objects of government. For the protection of life, liberty, and property, men have yielded up their natural rights and established governments. Is, then, the right of employment in a laboring man property? That it is, we think cannot be questioned. The property of the capitalist is his gold and silver, his bonds, credit, etc., for in these he deals and makes his living. For the same reason, the property of the merchant is his goods. And every man's trade or profession is his property, because it is his means of livelihood; because, through its agency, he maintains himself and family, and is enabled to add his share towards the expenses of maintaining the government. Can it be said, with any degree of sense or justice, that the property which a man has in his labor, which is the foundation of all property and which is the only capital of so large a majority of the citizens of our country, is not property; or, at least, not that character of property which can demand the boon of protection from the government? We think not. To destroy this property, or to prevent one from contracting it or exchanging it for the necessities of life, is not only an invasion of a private right, but is an injury to the public, for it tends to produce pauperism and crime. This relief has been granted to employers in many forms. Workmen have been enjoined from collecting about the employer's place of business for the purpose of ridiculing his employees with a view of causing them to stop work; and many other demonstrations of the same character and purpose have been enjoined, of course, on the theory that it was an unlawful act. To deny the same relief to the employee under similar circumstances would be a reproach to the law. It is true that in many cases the

element of conspiracy existed, but the principle is the same. Nor have the courts refused this protection to employees, but in a vast majority of cases of the kind it has been held that a legal right had been invaded, and the law imposed a liability.

There are few cases that might possibly sustain the respondent's contention. Those which they have cited, however, we think are clearly not in point, or are easily distinguished from the case at bar. *Benjamin v. Wheeler*, 8 Gray 409, and *Randall v. Hazleton*, 12 Allen 412, do not deal in any way with the principle under discussion here. In *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373, it was held that an employer had a right to refuse to employ, or to retain in his service, any person renting certain specified premises; and the owner of such premises had no cause of action against him for the exercise of such right, though such refusal was through malice or ill-will to the owner. An examination of that case shows that there were conditions which the defendant had a right to take into consideration in employing men, and which no one else had a right to question; that if his employees remained in the house the rent of which was the subject of controversy, the renting of the house being the business of an enemy of the employer, it was liable to affect the character of the workmen and their attitude towards their employer. So many other questions entered into the consideration of that case that it seems to us it has no bearing on the case at bar.

Raycroft v. Taynton, 68 Vt. 219, 35 Atl. 53, 54 Am. St. 882, 33 L. R. A. 225, was another case of somewhat the same character. There a superintendent of a quarry refused to permit another to take stone therefrom unless the latter discharged a certain employee, and it was held that he was not liable for causing such discharge. But whether the court wisely decided this case on the circumstances controlling it, it was evident that the court proceeded upon the theory that there was no lawful right invaded in that particular

case, and that where the lawful right was invaded, an action would lie, for in discussing the case, it said:

"The authorities cited for the plaintiff clearly establish that if the defendant without having any lawful right, or by an act, or threat, *aliunde* the exercise of a lawful right, had broken up the contract relation existing between the plaintiff and Libersont, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor."

The English case upon which this doctrine of nonliability rests—and we have gone outside of the cases cited by the briefs for the purpose of determining this case, as the principle involved seems to us to be of some importance—is *Allen v. Flood*, 67 L. J. Q. B. 119. This is the celebrated Boilermakers case, where the boilermakers in common employment with the respondents, who were shipwrights working on wood, objected to work with the latter on the ground that in a previous employment they had been engaged on iron work. The appellant, an official of the Boilermakers' Union, in response to a telegram from one of the boilermakers, came to the yard and dissuaded the men from immediately leaving their work, as they threatened to do, intimating that if they did so he would do his best to have them deprived of the benefits of the union, and also fined. The appellant then saw the managing director, to whom he said that if the respondents, who were engaged from day to day, were not dismissed, the boilermakers would leave their work or be called out. The respondents were thereupon dismissed, and it was held by a majority of the judges in the House of Lords that no action would lie. This opinion by the different Lords is entirely too long to review or to make any attempt to review. But whatever may be said of it, it is tinged with the idea which prevails in many of the decisions that, where competition is the stimulating motive in interfering with employment, such competition is a justification for the act. But even outside of that question,

the opinions of the majority of the Lords in this case show that they are not in harmony with the rule that had theretofore been established in the English courts, and that has since been almost universally followed in both England and America. The Lords themselves were informed of this by the very able dissenting opinion of the Lord Chancellor who, after reviewing the cases and the case under consideration, concluded as follows:

"I regret that I am compelled to differ so widely with some of your Lordships, but my difference is founded on the belief that in denying these plaintiffs a remedy we are departing from the principles which have hitherto guided our courts in the preservation of individual liberty to all. I am encouraged, however, by the consideration that the adverse views appear to me to overrule the views of most distinguished judges, going back now for certainly two hundred years, and that up to the period when this case reached your Lordship's House there was an unanimous concensus of opinion; and that of eight judges who have given us the benefit of their opinions, six have concurred in the judgments which your Lordships are now asked to overrule."

One of the oldest cases on this subject is that of *Keeble v. Hickeringill*, 11 East 574. This was an action for interfering with a certain right of hunting by the plaintiff, and of a right to the use of a certain pond or grounds. The discussion of the case took a wide scope. The opinion was rendered by Chief Justice Holt, and in the course of the discussion by the eminent judge, he divided these different classes of actions as follows:

"Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of the man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the King. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. . . . The

other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases."

In *Bowen v. Hall*, 50 L. J. Q. B. 305, on appeal from the judgment of Queen's Bench, it was held that, where one had a contract for exclusive personal service, the plaintiff could maintain an action against the defendant for maliciously procuring the other party to the contract to break it, notwithstanding that the strict relation of master and servant did not exist between them. There it was said:

"Merely to persuade a person to break his contract may not be wrongful in law or fact, . . . but if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong one, and therefore a wrongful act, and therefore an actionable act if injury ensue from it;"

citing *Lumley v. Gye*, 22 L. J. Q. B. 463.

In an article in 54 Central Law Journal, commencing at page 425, an extended review is made of this subject, and the authorities cited. There a quotation is made from the case of *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 68 Am. St. 203, 43 L. R. A. 797, where the court said:

"The common law seeks to protect every person against the wrongful acts of others, whether committed alone or by combination, and an action may be had for injuries done which cause another loss in the enjoyment of any right or privilege or property. No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation or to threaten to do so for the sake of compelling him to do some act, which in his judgment, his interest does not require. Losses willfully caused by another from motives of malice to one who seeks to exercise and enjoy the fruits and advantages of his own experience, industry, skill and credit, will sustain an action."

In that case the action was for the interference with an employment. It was further said:

"Appellee's counsel concede, and we think it is the law, that where one maliciously brings about the discharge of an employee, where the contract between the latter and his employer is terminable at will, the injured employee is entitled to recover."

The same author, in discussing the natural consequence of competition between laborers, where it is conceded that the man who underbids his rival may retain the latter's situation with impunity, says:

"But if an interloper seeks, not employment for himself or for one in whom he is directly interested, but the mere discharge of another, such conduct is wanton, unjustifiable in law, and actionable if damage result."

And the article concludes as follows:

"From the foregoing discussion the rule of law may be deduced, that every one has a natural right to conduct his trade, business, profession, or legal relationship arising out of contract free from all intentional and wanton interference on the part of those whose sole object is to damage him by refusing his patronage, withdrawing his employees, or interrupting the valuable relation into which he, by contract, has entered."

In *Purington v. Hinchliff*, 219 Ill. 159, 76 N. E. 47, 109 Am. St. 322, 2 L. R. A. (N. S.) 824, it was held that any person or combination of persons who unlawfully, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, are liable in damages for loss wilfully caused by such action. In the case of *London Guarantee & Accident Co. v. Horn*, 206 Ill. 493, 69 N. E. 526, 99 Am. St. 185, appellee was in the employ of Arnold, Schwinn & Co. of Chicago, as foreman of the frame department of its bicycle factory, and on that day, while engaged in his work, was injured while attempting to operate a milling machine, from which he suffered the loss of two fingers on his right hand. At the time of this injury, Arnold, Schwinn & Co. carried an indemnity policy in the London Guarantee & Accident Company, indemnifying the firm from injuries to its

employees, to the extent of $5,000. The policy provided that, if any suit should be brought against the assured to enforce a claim for damages on account of an accident covered by the policy, immediate notice thereof should be given to the company, and the company would defend, etc., the ordinary provisions in an indemnity policy. The company offered the appellee a certain amount of money in settlement of his claim, and informed him that, unless he accepted that amount they would see to it that he was not re-employed by Arnold, Schwinn & Co. The offer was refused, and suit was brought against Arnold, Schwinn & Co., in which a verdict was subsequently rendered for $3,500. The statement is long, but the essence of it is that the insurance company prevailed upon the employer to discharge the plaintiff by threatening to cancel the policy which the manufacturing company had in its company, and the suit was brought against the London Guarantee Company by Horn for damages for loss of employment, and the court held that he could recover, holding that one whose discharge from employment was procured by a third party had a right of action against such party. In this case the authorities are reviewed at great length, and the general doctrine announced as we have indicated.

In *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934, 11 Am. St. 367, it was held, that an action lies in behalf of an employee against a person who has maliciously procured the employer to discharge such employee from employment in which he is engaged under a legal contract; and that an action will lie where the period for which the employment is to continue is not certain, if damage result from the discharge; that the fact that no contract or legal right of the employee as against the employer is violated by the employer, or that no action can be maintained by the employee against the employer for such discharge cannot prevent a recovery against the third person who has maliciously procured the discharge, and which discharge would not have occurred but for such procurement. In *Thacker Coal etc. Co. v. Burke*, 59 W. Va.

253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, it was decided that one who maliciously entices a servant in actual service of a master to quit his service is liable to action therefor, and that if one wantonly and maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person to the injury of that third person it is actionable. In *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 83 Am. St. 289, 52 L. R. A. 115, which was an action for maliciously by means of slanderous charges inducing a third person to discharge the plaintiff from his employ, the action was sustained, the court saying:

"Finally, we see no sound distinction between persuading by malevolent advice and accomplishing the same result by falsehood or putting in fear. In all these cases the employer is controlled through motives created by the defendant for the unprivileged purpose. It appears to us not to matter which motive is relied upon. If accomplishing the end by one of them is a wrong to the plaintiff, accomplishing it by either of the others must be equally a wrong."

See, also, *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, 50 S. E. 353, 106 Am. St. 137, 69 L. R. A. 90; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96, 60 Am. St. 252; Addison, Torts (8th ed.), p. 7.

There are hundreds of these cases cited in the cases which we have quoted from which sustain the doctrine that the person causing the loss of employment under such circumstances as were the cause of the loss in this case are liable if damages ensue. It seems to be almost the universal doctrine of the courts of the country. Nor are we able to find any just criticism for such a rule. It is an excellent rule of action to refrain from interference with the affairs of others, and especially if the motive actuating such interference is to work injury to others.

The judgment will be reversed, and the cause remanded with instructions to proceed with the trial of the case.

RUDKIN, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 9044. Department Two. December 7, 1910.]

E. G. Cook, *Respondent*, v. Danaher Lumber Company, *Appellant*.[1]

Master and Servant—Assumption of Risks—Factory Act—Question for Jury. Under the factory act of 1905, requiring a mill owner to guard machinery where the employee is liable to come in contact with it in the performance of his duty, the defense of assumption of risks does not apply unless the court can say, as a matter of law, that the employee was not in the performance of duty when he came in contact with an unguarded shaft; and this the court cannot do, where there was a conflict in the testimony as to whether an employee, injured on an unguarded shaft, had to reach over the shaft in order to clean up and remove sticks from a conveyor chain.

Same—Question for Court. Assumption of risks, under the factory act should be withdrawn from the jury, where reasonable minds cannot differ as to the master's failure to comply with the act.

Same—Guarding Machinery—Factory Act—Application. The factory act requiring machinery to be guarded is not limited to employees working with the machine, but applies to any employee whose work makes it possible for him to be injured.

Master and Servant—Contributory Negligence—Evidence—Question for Jury. One employed to clean up in a mill and keep a conveyor chain clear is not guilty of contributory negligence, as a matter of law, in reaching over a shaft three feet high to clear the chain, where, under his testimony, the shaft was always in motion when he was about it, making his knowledge of the key-seat on the shaft a question for the jury.

Same—Unsafe Methods of Work—Instructions. Where the court has defined the issues and submitted the law of choice between places to work, it is not error to instruct in the abstract as to the servant's duty to adopt the safer way, and to refuse an instruction based upon the concrete facts of the case.

Same—Due Care—Test—Instructions. It is not prejudicial error to make the test of due care the conduct of an "ordinarily prudent man," where it does not stand alone, the jury being told to compare what was done with what would be done by a man acting with ordinary prudence, also considering all the evidence throwing light upon the man's knowledge and intelligence.

[1]Reported in 112 Pac. 245.

DAMAGES—PERSONAL INJURIES—EARNING CAPACITY. The measure of damages for impaired earning capacity is the difference before and after the accident, and also the use made of it.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS—DAMAGES—EARNING CAPACITY. An instruction as to plaintiff's impaired earning capacity, is not prejudicial error, where the sum awarded was probably limited by the maximum recovery allowed by statute, and no other jury would likely give a less sum.

TRIAL—PERSONAL INJURIES—EXHIBITION OF PERSON—EVIDENCE. An indecent exposure of the person of plaintiff in a personal injury case, calculated to arouse the prejudices of the jury, is not ground for reversal if within the *res gestae* of the case.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered February 24, 1910, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by an employee in a mill. Affirmed.

Hudson & Holt, for appellant.

Govnor Teats, *Hugo Metzler*, and *Leo Teats*, for respondent.

CHADWICK, J.—Plaintiff was employed by defendant in the work of cleaning up on a part of the lower floor of a sawmill owned and operated by the defendant. He worked within certain defined limits, and his duty was to clean up all sawdust and waste as it accumulated about the machinery, and push or carry it to a conveyor chain which carried the trash away. Plaintiff had been employed about sawmills for some time, but had not directed the movement of any machinery. He had worked for defendant about four months when the accident occurred. In the zone of plaintiff's employment, there was a shaft about four feet long, which operated a pulley. Behind or east of it, the space was limited; possibly so much so that appellant could not use the long-handled scrapers which he was accustomed to use when working at his usual place of employment, which was to the west of the shaft. The space to the west was comparatively open, and the duties of plaintiff involved no particular danger.

About two weeks before the accident, the installation of a sprinkler system was inaugurated by defendant. Those engaged in this work created a different condition in the surroundings, in this: they put pulleys on another shaft further to the west, set up two work benches with pipe cutting machines and a threader in close proximity to the place where plaintiff was accustomed to push the waste on the conveyor chain; the pipe when cut into proper lengths was put on the floor in the space usually occupied by plaintiff; a guard was also taken off the shaft upon which plaintiff was injured. The conveyor chain returned out of a box or guide, and it was not unusual for short boards to come out of the conveyor box. If they were carried on top of the chain, they would fall to the floor of their own weight; but at times they would lodge under the chain when, if carried into the bull wheel or sprocket, they might break the chain, causing it to "pile up." Plaintiff, being on the east side of the unguarded shaft which had an exposed key-seat running its full length, observed a length of edging protruding from the conveyor but held under the chain. This shaft was about waist high to a man of ordinary height, and the chain, according to defendant's testimony, was about forty-two inches from the shaft; while plaintiff's testimony shows that it was less than three feet. Plaintiff leaned over the shaft to reach the edging and pull it out, when his jumper coat caught on the shaft, his clothing was stripped from his body, his arm was broken so that amputation followed, one of his legs was so injured that he complains that it will be permanent, and his private members were so torn and lacerated as to materially interfere with, if not entirely destroy, some of their material functions. Defendant set up the usual defenses of assumption of risk and contributory negligence. From a judgment in favor of the plaintiff, defendant has appealed.

The complaint is based upon the factory act. In pursuance of that theory, the court instructed the jury as follows:

"In this case the defense of the assumption of risk set up in defendant's third affirmative defense in its answer, has no application and you will disregard that defense. It will be your duty in this case to bring in a verdict for the plaintiff, unless it appears from a fair preponderance of the evidence that the plaintiff was guilty of negligence which contributed to and was one of the causes of his injury. The burden rests upon the defendant to prove contributory negligence by a fair preponderance of the evidence."

It is contended that this is an instruction on the weight of the evidence. Our attention is called to the fact that the factory act of 1905 differs from the act of 1903, in that a mill-owner is not required to guard his machinery unless the employee is liable to come in contact with it in the performance of his duty; and hence, respondent being under no duty to be on the side of the shaft opposite the conveyor, there was no duty imposed upon appellant, and the recovery should have been denied on the ground of assumption of risk. To so rule would require us to hold, as a matter of law, that respondent was not engaged in the performance of his duty when injured; that is, that having put himself in an unusual and unnecessary position and having reached over the shaft in such manner as to make it evident that he had gone beyond his duty in utter disregard of his own safety, he cannot be heard to claim the benefit of the factory act. The factory act was passed in obedience to the commonest instincts of humanity, and should not be construed so as to defeat its intent, except in a plain case. For two weeks, or at least while the pipe fitters were at work on the lower floor of the mill, respondent had performed a certain part of his work when upon the east side of the shaft. He testified that he had reached over, as he did in this instance, a number of times without injury. It is true that, if the testimony showed that the conveyor chain was so far beyond respondent's reach that the legal conclusion followed that he had voluntarily abandoned the path of duty, it might be so held. But the evidence is conflicting on this point. It was respondent's duty

to clean up, and he was expected, if he saw scraps of boards in the conveyor, to remove them. This duty, taken in connection with the fact that the jury must have found his usual place of work to be obstructed, in some degree at least, by the pipe men, and the further fact that a model or rather reconstruction of the place where respondent was injured was exhibited to the jury, allowing them to test with their own eyes and senses the conflict of testimony as to the distance from the shaft to the conveyor chain, was enough to sustain the verdict upon this point. Under this state of facts, we do not think the court erred in saying to the jury that respondent was bound under the factory act. The shaft was in the open, and an employee would not have to reach for it or climb over other machinery to come in contact with it; yet he was liable to come in contact with it in the performance of his admitted duty.

In some cases the court might hold that the servant could not recover as a matter of law, or in doubtful cases he might submit the question of fact to the jury. But where the situation is such that reasonable minds could not differ, it is the duty of the court to withhold the question of compliance with the factory act from the jury and decide it as a matter of law. Liability to injury by coming in contact with unguarded machinery does not mean that an employee must be working with the machinery. It is enough that, in the performance of such work as he has to do, it is possible for him to be injured. We think these principles are covered by the case of *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915, and the cases collected under Rem. & Bal. Code, § 6587.

Nor do we think that respondent is to be held guilty of negligence as a matter of law. He was in the performance of his duty. He, as men of ordinary understanding and common prudence will do at times, obeyed the impulse of his mind to reach over and clear the chain. He had done the same thing before, and while custom will not excuse negligence, we cannot say that his act was so in disregard of the duty a person

owes to himself as to bring him within the rule of contributory negligence when, as in this case, the factory act controls and the accident would not have happened but for its violation.

It is insisted that the key-seat on the shaft was in plain view, and was in itself a warning of danger. Whether respondent knew of the key-seat or could see it, the machinery, according to his testimony, being always in motion when he was about it, was a question for the jury.

Error is also predicated on the refusal of the court to instruct upon the doctrine of a safe and unsafe way of doing the work. It is complained that the court refused the instruction based upon the concrete facts of the case, and in lieu thereof submitted only the abstract proposition of law that, "if there were two ways and neither one was safe and one was safer than the other, it was a question for the jury, if they were equally available and speedy." It is true that, as a general proposition, a court should not instruct in the abstract; but whether an instruction is to be so considered must be determined by reference to the evidence as well as the instructions as a whole. The court had defined the issues and submitted the defense of a choice between places to work, and it was not error to follow it with the abstract law covering the issue as defined.

It is complained, also, that the court instructed the jury that the test of due care was the conduct of an "ordinarily prudent man." If this stood alone, it might be prejudicial, for an ordinarily prudent man might act recklessly at times. But the whole instruction given by the court cannot be held to be prejudicial, for the premise of the instruction is, "the way to determine whether the plaintiff was negligent or not is to compare what was done by him with what would have been done by a man acting with ordinary prudence;" and its conclusion is:

"In determining whether plaintiff was guilty of contributory negligence you should consider all of the facts shown by the evidence including the evidence throwing light upon the

age and experience and knowledge and intelligence and opportunity for knowledge of the plaintiff."

It is urged that the court erred in refusing to instruct the jury as follows:

"You are instructed, gentlemen of the jury, that in determining the extent to which the earning capacity of the plaintiff has been impaired by his injuries, you may take into consideration, if you see fit, what he has been earning in the immediate past and the probabilities of what his earnings would have been in the future if he had not received his injury; and in this connection, you may consider the physical condition of the plaintiff at the time of his injury and what it would have been but for his injury."

This request, more specific than the general charge of the court, embodied a correct statement of the law, and might well have been given. The measure of damages for loss or impairment of earning capacity is the difference between the earning capacity before and after the accident, and this depends not only on the actual earning capacity, but on the use made of it. However, it would seem that a jury of average intelligence would understand this without explicit instructions from the court. In any event, we do not think the failure to give the instruction was prejudicial in this case. The verdict of $7,500 doubtless finds its limitation in the statute fixing the maximum recovery in that sum, rather than in the testimony. If the respondent is entitled to recover at all—and the verdict establishes that fact in his favor—the character and extent of his injuries were such that there is no probability that another jury would return a verdict for a less sum.

Finally, it is claimed as error that the court permitted the plaintiff to expose his person before the court and jury; that the exhibition was indecent, and calculated to arouse the prejudices and passions of the jury. This point has been but recently decided by this court adversely to the contention of the appellant. *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 149. While such exhibitions are not to be encouraged as a

general thing, the only safe rule is to leave such requests to the discretion of the trial judge, and if within the *res gestae* of the case, his decision will not be held to be prejudicial error.

Finding no reversible error, the judgment is affirmed.

RUDKIN, C. J., DUNBAR, and CROW, JJ., concur.

[No. 8880. Department Two. December 8, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. PETER MILLER, *Appellant*.[1]

CRIMINAL LAW—EVIDENCE—CONFESSIONS—ADMISSIBILITY—DURESS. A confession is inadmissible as one obtained by duress, where it appears that the prosecuting attorney threatened the accused with a series of prosecutions which would culminate in cumulative sentences, unless he confessed, he was subjected to solitary confinement in a dark cell, and testified that he was subjected to severe cruelties and threatened with appalling punishments if he did not confess; and it appears that the jailors threatened many other prisoners if they did not confess, and confined them in the dark cell for refusal to do so.

CRIMINAL LAW—TRIAL—MISCONDUCT OF JURY—VIEW. There is such misconduct on the part of the jury as to require a reversal of a conviction, where it appears that the jury, on being sent to view a cell that had been occupied by the accused, inspected, on invitation, the office of a police captain who was an important factor in the prosecution, and it was alleged that such officer had assaulted the accused, and the captain conversed with the jurors on the subject of the assault, calling attention to the fact that the window gave full view from the street, and the jury was drawn into a social conversation with him.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 27, 1909, upon a conviction of burglary in the second degree, after a trial upon an information charging burglary in the first degree. Reversed.

[1]Reported in 111 Pac. 1053.

Joseph M. Glasgow, for appellant.

George F. Vanderveer and *Everett C. Ellis*, for respondent.

DUNBAR, J.—The prosecuting attorney of King county filed in the superior court of the state of Washington for said county an information, charging the defendant and one Willis Taylor, an accomplice, with the crime of burglary in the first degree. The defendant was arrested on the 22d day of June, 1909, and this information was not presented until the 10th day of August, 1909. In the meantime he was confined in the jail in the city of Seattle. A plea of not guilty was entered, the case was brought on for trial on the 29th day of October following, and on the 2d day of November the jury returned a verdict of guilty of burglary in the second degree. Throughout the trial of this case, the defendant conducted his own defense and appeared as his own counsel. Application for a new trial and motion in arrest of judgment were made and denied, judgment was announced, and appeal followed.

This conviction was obtained largely upon the alleged confessions of appellant and his accomplice, Taylor. At least, the confessions sworn to by the witnesses were an element in the case, and we must assume that such testimony may have been controlling in the minds of the jurors. The admission of this testimony is one of the errors assigned, it being the contention of the appellant, who appears here by counsel, that the testimony shows that these confessions were obtained by duress, and were not the character of confession which is specified in the law as the basis of conviction. We think this contention must be sustained. The trial was a long one and evidently exceedingly trying and vexatious to the trial court, who exhibited great patience and liberality towards the appellant throughout the trial. The record conclusively shows that the appellant possessed some little smattering of legal knowledge, and was exceedingly egotistical and vain over its acquirement; but this does not affect the main question of

whether the confessions were obtained by cruel treatment, threats, and persuasion.

According to the testimony of the appellant, the prosecuting attorney had threatened him with prosecution for divers and sundry crimes which would work cumulative sentences, in addition to other harsh treatment which it was claimed the appellant received at the hands of the prosecuting attorney. It was conceded by the prosecuting attorney that he had visited this appellant more than once at his cell, and once in company with the captain of the detectives, and with the prosecuting attorney of Spokane county. All the charges of cruelty were indignantly denied by the prosecuting attorney, but in answer to a question propounded by the appellant, if he had had such a talk with him, he did say this: "Under the laws of this state you could be charged with all these burglaries and your sentence would be tacked one on the other. I did tell him that. I suppose that was a sort of an implied threat. Otherwise I never said a word in any threatening manner." The prosecuting attorney was there for a purpose. The evident purpose was to obtain a confession from this appellant, and we think, under his own admission, that the threat which he made, or the implied threat as he terms it, was sufficient to render the confession made a confession obtained by duress. The appellant was confessedly a bright man and would understand, and it was no doubt intended that he should understand, that these cumulative sentences would follow if he did not confess. This is all that need be said so far as the testimony of the prosecuting attorney is concerned.

The appellant also testified that he was thrown into what he calls the "dark hole" in the jail; that he was maltreated, beaten with a bludgeon by the captain of the detective force, Tennant, and threatened with the most appalling punishments if he did not confess what he knew about this alleged burglary. The details of this alleged punishment and threats are too horrible and disgusting to set forth here. The only question is as to the truth of the statements made. These allegations of

threats and of barbarous treatment were denied by Captain Tennant, he claiming that he never had struck or abused the appellant, excepting once when the appellant attempted to assault him. Captain Tennant denied that he had ever put the appellant into the black hole or black cell; but it is conceded that appellant was confined in the black hole, and that he was there with the knowledge of Captain Tennant. While Tennant probably did not put him there, as naturally he would not, appellant was evidently ordered there by him, or if not by him, by some one in authority at the jail. It is not alleged or claimed anywhere that it was necessary to put appellant in this iron cell for the purpose of preventing an escape. The whole testimony shows conclusively that it was done for the purpose of extracting a confession from him. The same may be said of the treatment accorded the boy Willis Taylor.

The effect of solitary confinement on the mind of a person charged with crime may be imagined. It is a well-known psychological fact that men and women have frequently confessed to crimes which they did not commit. They have done it sometimes to escape present punishment which had become torture to them; sometimes through other motives; and the object of putting the inmates of this jail in this dark cell in solitary confinement is easily understood. To show the custom prevailing at that jail, many witnesses were introduced to testify as to the treatment that they had received while inmates of the jail. They all testified that there had been threats made to make them confess to the crimes with which they were charged, and that upon their refusal to do so, they had been put in this black hole. There was no denial by the officers of the jail that this had been done; nor did they always deny that it was done for the purpose of eliciting a confession. As showing by the testimony of the officers of the jail themselves the use to which the solitary cell was put, the jailor, Corbett, testified that it was common while the police department and the detectives were investigating a

case, sometimes taking them twenty-four hours, to put the person suspected into this dark cell. In answer to the question: "What did that man do that you put him in there?" he said:

"Mr. Holland had him arrested for selling a valise, and he lied so much, he said 'This man ought to be punished; he is the biggest liar I ever heard of,' so I just let him into the black hole, or the dark cell. Q. You admit then before this jury that you put him in the hole because he would not talk to suit the officer's purpose—you admit that before the jury? A. I admit that is what I put him in there for."

So that it seems that these officers, according to their own statement, not only put suspects in the black hole because they would not talk to suit the officers' purpose, or would not make confessions in regard to their own crimes, or in regard to crimes of somebody else, which they were presumed to know about; but that they had passed judicially upon their character and upon the crimes with which such persons were charged, and had them in there to punish them. The record is so full of this kind of testimony and so plainly indicates the fact that the sacred rights of citizenship had been invaded by the officers of the jail, the police and detective department, that it is scarcely necessary to cite further instances.

Neither policeman, detectives, nor jailors are clothed in this country with inquisitorial powers. It is true that some of the laws of Spain have been engrafted on ours; but not the dungeon, the bludgeon, the burning faggot, or any of the concomitant tortures of the Inquisition. These belong to the ages of bigotry, intolerance, and superstition, and have no place in our civilization. An attempt to revive them, even in a mild form, ought to call forth the execration of the people, and the severest condemnation of the law. In the necessarily slow process of evolution of sentiment, it has required centuries to establish the liberty of the subject at its present standard. The strangling hold of superstition, tyranny, and

oppression relaxed reluctantly, and after it has been once dethroned, an attempt to establish its dominion is an assault on liberty as unpatriotic as it is inhuman. It matters not that the victim may be guilty of the crime of which he is suspected, or for which he is arrested. These self-constituted judges might possibly be mistaken, for innocent men are frequently suspected and frequently arrested. In addition, the law throws its protecting aegis around the innocent and the guilty alike, on the assumption that every man is innocent until he is proven guilty, and demands that his guilt be clearly established before punishment is inflicted. This beneficent rule has been reversed by the practices shown by the record, and the presumption of guilt attaches with the suspicion. Showing the views of the court on these and similar practices, reference is made to *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044, and *State v. Montgomery*, 56 Wash. 443, 105 Pac. 1035.

The misconduct of the jury is also alleged as error, and we think this contention must be sustained. It was the sworn contention of the appellant that, when he was taken to the office of the captain of detectives, Mr. Tennant, he was assaulted by the captain with a bludgeon, knocked down, and kicked into insensibility, and that, when he came to, he felt a sensation of something rough on his face, and discovered that his face was being licked by a bulldog. This was indignantly denied by Captain Tennant. At the close of the testimony in the case, the jury were sent out to view the cell in which the appellant had been confined, with the ordinary instructions to examine the cell and to have no communication with others on the subject of the trial. The examination was made, and what occurred while they were there is set forth in the evidence of two of the jurors, Morris Sobrato and C. W. White. Sobrato states in his affidavit that, after the jury

"Had descended by the elevator to the first floor, one of the men connected with the police department suggested that we [the jury] come into Captain Tennant's office; that we

were then conducted to the office of Captain Tennant, chief of detectives, and into the presence of Captain Tennant; that while there, one of the jurors picked up a pen or pencil lying on Captain Tennant's desk and made the remark, addressed to all of us, that this was the club or instrument with which the defendant Peter Miller had been beaten; Captain Tennant then said, in substance, that they had no other instrument of torture. Some of the members of the jury were standing right by the window, and Captain Tennant called our attention to the fact that the window was next to the street, and that everything going on inside could be distinctly seen from the street. Just before we left, Captain Tennant showed us a picture on the wall of Seattle's first chief of police."

The affidavit of White was substantially the same, with the addition that they were informed that Captain Tennant had invited the jurors to inspect his office, and that they went in there with the result specified in the other affidavit. He also swears, in addition, that he heard one of the jurors say: "I suppose that is the bulldog that licked Miller's face," and Tennant laughed and said, "That is the dog." He also heard Tennant say: "This office is right on the street, and any one can look from the sidewalk right into it." There can be no reasonable contention that this was not misconduct on the part of the jury, and such misconduct as ought to reverse the judgment in this case. The jury not only were drawn into a social communication with Captain Tennant, who was a very important factor in the prosecution of the appellant—which in itself was unfair to the appellant, but they received testimony there in relation to the club or bludgeon, and it was specially pointed out to them that the window was so low that anybody would see what was going on in the office, this evidently with the intention of impressing upon the jurors' minds that the violent scenes which were testified to by the appellant could not have occurred without being noticed by others from the outside. It is not necessary to establish the fact that this was prejudicial error. We think there are no cases which would hold to the contrary.

With the view we take of these two assignments discussed, it is not necessary to discuss the other assignments suggested. The judgment will be reversed.

Rudkin, C. J., Crow, Chadwick, and Morris, JJ., concur.

[No. 9054. Department Two. December 9, 1910.]

J. B. Beltinck, *Appellant*, v. Tacoma Theater Company *et al.*, *Respondents*.[1]

Contracts—Rescission—Defaults in Payment—Time of Essence. Where a contract, in which plaintiff agreed to pay $175 dollars per month for the display of an advertising drop curtain in a theater, does not make time of the essence, time becomes of the essence of the contract on defendant's demand for payment and threats to remove the curtain; and where plaintiff remains in default, the defendant may rescind the contract and declare a forfeiture.

Same—Waiver of Rescission—Acceptance of Payments. Acceptance after maturity of payments of monthly rent for the display of an advertising drop curtain in a theater, the rent being due in advance, does not waive the right to rescind the contract for defaults in payment, where the payments made were received after protest and frequent demands and repeated threats to remove the curtain.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 8, 1910, dismissing, at the close of plaintiff's case, an action on contract. Affirmed.

Fitch & Jacobs, for appellant.

Ellis, Fletcher & Evans, for respondents.

Crow, J.—This action was commenced by J. B. Beltinck against Tacoma Theater Company and Tacoma Theater Trust Company, to recover damages for the breach of a written contract. At the close of plaintiff's evidence, the

[1]Reported in 111 Pac. 1045

trial judge granted a nonsuit and dismissed the action. The plaintiff has appealed.

On March 15, 1906, the Tacoma Theater Company, party of the first part, and Beltinck-James Company, appellant's assignor, party of the second part, entered into a contract, material portions of which read as follows:

"That said party of the first part, for the consideration hereinafter expressed, hereby grants unto the party of the second part, or their assigns, the exclusive right to place an advertising drop curtain in the Tacoma Theater, city of Tacoma, state of Washington, and the party of the first part agrees to hang and furnish all tackle and appliances therefor; said curtain to cover the entire proscenium opening of the said theater; and said first party will not allow any other scenic or curtain advertising in said theater, while this contract is in force; and it will use the said advertising drop curtain during all performances, and agrees that said advertising curtain shall be shown covering the entire proscenium opening, between each and every intermission, for the entire length of the intermission, between each and every act, and that during entire time said advertising drop curtain is displayed, the advertisements on said curtain will be plainly visible from all parts of the theater, and furnish to said party on request a list of 'Dark Nights,' and opening and closing dates of each season. . . . The party of the first part agrees to make a pro rata reduction from monthly payments of one hundred and seventy-five dollars, as hereinafter mentioned, whenever said theater is closed, or less than twenty performances occur monthly.

"In consideration of the grants and privileges herein set forth on the part of the party of the first part, the party of the second part agrees to pay to the party of the first part, one hundred and seventy-five dollars per month, payable monthly in advance. It is hereby mutually agreed by the parties hereto, that this contract is made for a term of three years from the date of installation of said advertising drop curtain by the party of the second part, and that said regular monthly payments shall begin from that date."

The curtain was installed and remained on exhibition until January 1, 1907. Appellant made partial payments, but

failed to make them when due. Entertainments were booked in advance, and respondents repeatedly demanded advance payments of rent. On December 28, 1906, appellant being in arrears, respondents served on him the following notice:

"You are hereby notified that because of your failure to keep and perform the terms, covenants and conditions on your part to be kept and performed as contained and set forth in that certain agreement dated the 15th day of March, 1906, between yourselves as party of the second part and the undersigned as party of the first part, the said undersigned does declare said agreement terminated and at an end. You are requested to forthwith remove your advertising drop curtain from the premises of the undersigned, to wit, The Tacoma Theater, in the city of Tacoma, Washington, and forthwith pay to the undersigned all amounts now due from you to the undersigned to this date. You are further notified that unless you at once signify your intention to remove said curtain and do forthwith remove the same, that the undersigned will remove the same and hold the same subject to your order."

On December 31, 1906, appellant served on respondents the following writing:

"This is to notify you that we have a contract with your company for a period of three years for maintaining the advertising curtain at the Tacoma Theater, which said contract has not yet expired. We are now, and have at all times been ready and willing to comply with all the conditions of said contract, and if you remove, or in any way interfere with the said curtain in violation of the terms and conditions of the said contract, we will hold you responsible in damages for the same."

Appellant at the same time, but after the rescission had been declared, tendered all rent then due. Respondents refused to accept the same, and forthwith removed the curtain. The trial judge held that appellant had no right to demand a display of the curtain after the commencement of any month unless he had tendered or paid the rent in advance; that the stipulation to pay in advance was a vital one, although the contract did not specifically state that time was of its essence; that as all performances were booked in ad-

vance, there could have been no difficulty is ascertaining open nights, or how much advance rental would become due in any month, and that the respondents were entitled to rescind the contract for appellant's breach.

Appellant contends that, although the contract provided for advance payments, time was not of its essence, and that the respondents were not entitled to rescind without demanding the rent and informing him of their intention. Under his contract, appellant was certainly entitled to insist on a display of the curtain as long as he kept his rentals paid in advance. Could he, however, insist upon its display when in default? The evidence shows that respondents, through Mr. Herald, their manager, had repeatedly demanded payment; had frequently protested appellant's failure to pay, and had threatened to remove the curtain. Appellant, when interrogated as to whether the manager had so threatened to remove the curtain if the rent was not paid, stated that he did not remember. Mr. Herald's statements are undisputed. As a witness for respondents he testified to his frequent demands for payment and his frequent threats to rescind. There is no dispute upon this point. Although appellant contends that time was not of the essence of the contract, time became of its essence, by respondents' demand for payment and threats to remove the curtain.

Appellant seems to rely upon an alleged course of dealing whereby respondents constantly allowed him to make payments after they had become due, and continued the curtain. He insists that the respondents themselves did not consider time of the essence of the contract; that they disregarded its provisions and permitted him to make defaulted payments. He now invokes the rule that, where parties to a contract give it a particular construction, such construction will be adopted by the courts when enforcing its provisions. In *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, time by express terms was made the essence of a contract for the sale of real estate, the purchase price to be paid in installments. Many payments

were made and accepted after their maturity. Thereafter the vendors refused a tender of two installments, one of which was past due, and later commenced an action to quiet their title. Passing upon their contentions, this court, citing numerous authorities, said:

"The rule is firmly established in this state that, where time is made of the essence of a contract of sale, the vendor may declare a forfeiture of the contract for nonpayment of the purchase price or any installment thereof. . . . But the rule is equally well established that the right of forfeiture must be clearly and unequivocally proved, and that the right may be waived by extending the time for payment, or by indulgences granted to the purchaser. . . . Of the nineteen monthly installments paid by the appellants, two were paid and accepted before maturity, and the remaining seventeen were paid and accepted from a few days to a few months after maturity. Such a course of conduct constituted a clear waiver of the provision making time of the essence of the contract, and the vendors could not thereafter declare a forfeiture, 'until after demand for payment and the lapse of a reasonable time,' as held by this court in *Whiting v. Doughton, supra* [31 Wash. 327, 71 Pac. 1026], or by giving definite and specific notice of their intention to claim a forfeiture, as held in *Watson v. White, supra* [152 Ill. 364, 38 N. E. 902.] Common honesty and fair dealing required this much at their hands. The repeated indulgences granted to the purchaser clearly distinguish this case from *Garvey v. Barkley*, 56 Wash. 24, 104 Pac. 1108."

Appellant had failed to pay in accordance with the terms of his contract, although frequent demands were made upon him. Respondents were not compelled to refuse defaulted payments in order that they might preserve their right to rescind the contract for appellant's breach. They accepted such payments, for which appellant received credit, but they protested against appellant's course of dealing and repeatedly threatened to remove the curtain. Appellant thereafter remained in default; whereupon they rescinded. This is not an instance where a rescission was declared without previous demand or warning. If respondents, after repeated demands

and warnings, could not rescind, they would have been compelled to continue the curtain indefinitely, although appellant constantly remained in default. The contract imposed no such obligation.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MORRIS, and CHADWICK, JJ., concur.

[No. 9026. Department Two. December 10, 1910.]

WILLIE TALKINGTON, *by his Guardian Ad Litem J. B. Talkington, Respondent*, v. WASHINGTON VENEER COMPANY, *Appellant*.[1]

MASTER AND SERVANT — INJURIES TO SERVANT — FACTORY ACT — GUARDING SHAFTING — APPLICATION — ASSUMPTION OF RISKS. Rem. & Bal. Code, § 6587, requiring the operators of factories and mills to provide suitable safeguards for all shafting "with which the employees . . . are liable to come in contact while in the performance of their duties" can have no application to an accident in which a boy was injured while voluntarily using a shaft as a horizontal bar for gymnastic exercises, and did not come in contact with it in the performance of his duties; and the defense of assumption of risks accordingly applies (CROW, J., dissenting).

SAME — CONTRIBUTORY NEGLIGENCE — YOUTHFUL EMPLOYEE — QUESTION FOR JURY. Where the evidence is in direct conflict as to the appreciation of danger by a boy fourteen years of age, it is a question for the jury to determine whether he was guilty of contributory negligence in playing on an idle shaft, which would start revolving when the mill started up.

SAME — CONTRIBUTORY NEGLIGENCE — FAILURE TO HEED WARNING — INSTRUCTIONS. Where a boy was ordered by the foreman to get down from a shaft upon which he was playing, for the reason that the mill was about to start up, and there was positive evidence that he had time to do so, but stood for a perceptible period of time with his arm on the shaft, it is reversible error to refuse to give an instruction that, if he could have obeyed the order with reasonable diligence and failed to do so, he could not recover.

[1]Reported in 112 Pac. 261.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered February 11, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor employed in a box factory. Reversed.

Bates, Peer & Peterson, for appellant.

Govnor Teats, Hugo Metzler, and Leo Teats, for respondent.

Crow, J.—Action for personal injuries by Willie Talkington, by his guardian *ad litem*, against Washington Veneer Company, a corporation. From a judgment in his favor, defendant appeals.

The appellant corporation owns and operates a box factory in which it has installed a machine for cutting veneer. The respondent, Willie Talkington, a minor, fourteen years of age, was employed by appellant to work near this machine. Slightly back of and parallel with it, but about seven and a half feet above the floor, was an unguarded shaft, two inches in diameter. The mill frequently stopped, at which times the shaft revolved slowly or became stationary. Respondent and other boys employed in the mill were then in the habit of playing on the shaft by hanging to it with their hands and seeing how long they could remain after the shaft commenced to revolve. The boys were all subject to the orders of one Levi Fliflet, appellant's foreman, who worked with them. On the day of the accident, Willie Talkington threw one of his legs over the shaft, which was then stationary, and with his head hanging downward, told another boy he could not do the same act. The foreman ordered him down, telling him the mill was about to start, and that he might be injured. Respondent removed his leg from the shaft, had his feet on a bench underneath, but while his hand was still in contact with the shaft the mill started, it revolved, caught his arm, wrapped it around the shaft, and injured him.

There was evidence, some of it disputed, tending to show that, to the foreman's knowledge, the boys frequently played on this shaft; that they reached it by stepping on a bench or box some eighteen inches in height, located immediately beneath it on the mill floor; that they could not ordinarily come in contact with it while engaged in the performance of their duties, but that occasionally, when material accumulated on the bench, their heads might reach it while they were thus employed; that it was unguarded; that it could have been guarded without impairing its usefulness or functions, and that the foreman had cautioned the boys, including respondent, not to play on the shaft. Respondent alleges the appellant was negligent in failing to safeguard the shaft, and in knowingly permitting the boys to play on the shaft, they, by reason of their youth, being ignorant of the attendant dangers.

Appellant first contends that its alleged negligence in failing to guard the shaft is not sustained by the evidence; that under the factory act, Rem. & Bal. Code, § 6587, it was only required to provide and maintain safeguards on shafts with which its employees were liable to come in contact while engaged in the performance of their duties; that this particular shaft was far above the heads of the boys; that they could only reach it by climbing on the box or bench; that appellant was not required to guard it, and that it was not negligent in failing to do so. The trial court held the evidence of one witness, although disputed, was sufficient to show that at certain times the boys might come in contact with the shaft while in the performance of their duties, and submitted to the jury the question as to whether it should have been safeguarded. Section 6587, *supra*, provides that the operators of factories, mills and workshops shall provide reasonable safeguards for all shafting "with which the employees of any such factory, mill or workshop are liable to come in contact while in the performance of their duties." The undisputed evidence shows that at the time of receiving

the injuries complained of, the respondent was voluntarily using the offending shafting as a horizontal bar for gymnastic exercises, and that he did not come in contact therewith while in the performance of his duties. The majority of this court, with whom the writer does not agree, hold that such being the admitted fact, the factory act has no possible application, and that any question as to its violation should have been withdrawn from the consideration of the jury. The writer, speaking for himself only, is however, of the opinion that the action of the trial judge in submitting this issue to the jury should be sustained; that if at times, as the evidence of one witness indicates, appellant's employees while in the performance of their duties might come in contact with the shaft, it was appellant's duty to safeguard it. Had appellant not been negligent in failing to discharge this duty, the accident could not have occurred, and the respondent, a minor employee of tender years, who should have been instructed, warned, and protected against such dangers, would not have been injured.

Appellant further contends that the evidence did not show respondent was ignorant of the danger of playing on the shaft, or that the appellant had failed to warn him; that on the other hand, the evidence did show respondent fully appreciated and understood the danger, that as a matter of law he was guilty of such contributory negligence as to preclude a recovery herein, and that appellant's motions for a nonsuit and a directed verdict should have been sustained. We have carefully read the evidence, find that it was in direct conflict, and conclude that, in view of respondent's youth, it was for the jury to determine whether he was guilty of contributory negligence.

Appellant requested the following instruction:

"You are instructed that if you believe from the evidence that while the plaintiff, Willie Talkington, was on the shaft or using the shaft, he was instructed by the foreman to get down off from the shaft, and if you further find that the said

Willie Talkington, by the exercise of reasonable diligence, could have got down from the shaft before the machinery started, but that he failed and refused to obey said order, then the plaintiff cannot recover, and your verdict should be for the defendant."

This instruction was not given, nor was any other one to the same effect given by the trial judge. While there was evidence tending to show that the respondent did not have time to get down and away from the shaft before the machinery started, there was also positive evidence to the effect that he did have an abundance of time; that after he was ordered down by the foreman, he stood on the box with his hand on the shaft, for quite a perceptible period of time, before and until the mill started. There is no dispute as to the order given by the foreman; that it was given is conceded by all of the witnesses, the only dispute being as to the time that elapsed after it was given and before the mill started. The order being given, it was respondent's duty to promptly obey. He knew this duty and that he was subject to the commands of the foreman. If by exercising reasonable diligence he could have withdrawn himself from the shaft after the order was given, and before the machinery started, but by refusing to obey failed to do so, he cannot recover in this action. There was evidence introduced on behalf of appellant sufficient to sustain a finding of such refusal. The failure of the trial judge to give this requested instruction was prejudicial error.

The judgment is reversed, and the case remanded for a new trial.

RUDKIN, C. J., CHADWICK, and DUNBAR, JJ., concur.

MORRIS, J. (concurring)—I concur with the majority that the factory act has no application to this case, for the reason that the injury occurred while the respondent was at play. It is further apparent from the record that such an injury could not occur while respondent was at work, taking the height of the shaft above the table at which, and sometimes upon which, he worked. His act was, therefore, an independ-

ent, reckless act. He was 14 years old and understood its danger. The rule of assumption of risk should therefore apply, and the court should have directed verdict for appellant. The cause should be remanded with instructions to dismiss.

[No. 8919. Department Two. December 10, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. A. NICOLLS, *Appellant*.[1]

CITIZENS—CHILDREN OF CITIZENS—INDIANS. The civil status of one born of an Indian mother, by a white father who is a citizen of the United States, follows that of the father.

INDIANS—SALE OF LIQUORS—PROHIBITION—CONSTITUTIONAL LAW—POLICE POWER—PRIVILEGES. Under the police power the legislature can prohibit the sale of liquor to an Indian of mixed blood, although he be a citizen of the United States, without violating the rights and privileges guaranteed by § 1 of the fourteenth amendment to the Federal constitution.

SAME—INDIANS OF MIXED BLOOD—STATUTES. A statute prohibiting the sale of liquor to an Indian of mixed blood having more than one-eighth Indian blood applies to all such Indians, regardless of the legal status of his white father.

CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—INTOXICATING LIQUORS—PROHIBITION. The right to sell or drink liquor is not a constitutional right and may be granted to one class of citizens and denied to others.

INDIANS—SALE OF LIQUORS—PROHIBITION—INTENT. The element of intent is not a necessary ingredient of the offense of selling liquor to an Indian of the mixed blood, the statute not using the word "knowingly" or any qualifying words.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered February 11, 1910, upon a trial and conviction of selling intoxicating liquor to an Indian. Affirmed.

Abrams & Shamel, for appellant.

George Livesey and *J. W. Kindall*, for respondent.

[1]Reported in 112 Pac. 269.

CHADWICK, J.—Appellant was convicted of the crime of selling liquor to one Plaster, an Indian of mixed blood. The apt words of the statute under which the information was drawn are as follows: "That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor of any kind whatever . . . to any Indian whatsoever, or a mixed-blood Indian being more than one-eighth Indian, shall be guilty," etc. The fact of the selling is not denied. But the case is brought here upon numerous assignments of error, all of which are directed to two propositions of law; first, whether a person born of an Indian mother and a white father, being a citizen of the United States, is an Indian within the meaning of the law; and second, whether the want of intent is a defense to the crime charged.

That the civil status of one born of an Indian mother and a white father who is a citizen of the United States follows that of the father, is well established by the authorities. *Ex parte Reynolds*, Fed. Cas., No. 11,719; *United States v. Ward*, 42 Fed. 320; *United States v. Hurshman*, 53 Fed. 543; *Keith v. United States*, 8 Okl. 446, 58 Pac. 507. But it does not follow that there is any merit in the contention of the appellant that, because Plaster was a citizen of the United States, he is not, therefore, an Indian of the mixed blood within the meaning of the law; or that being a citizen, the enforcement of the law would result in an unlawful discrimination between citizens, in violation of the rights, privileges, and immunities guaranteed by §1 of the fourteenth amendment to the constitution of the United States. The cases bearing upon the question of citizenship have no relevancy here. The power of the legislature to pass all needful police regulations cannot be questioned, and so long as regulations bear with equal weight upon all of like situation or of the same class, they are universally upheld by the courts. The power of the legislature to pass laws prohibiting the sale of liquor to Indians or those of Indian descent, rests upon the same principle of protection to the public as laws prohibiting the sale of liquor to minors,

habitual drunkards, and the like. *State v. Mamlock*, 58 Wash. 631, 109 Pac. 47; 17 Am. & Eng. Ency. Law, 345; Black, Intoxicating Liquors, 42.

It is contended, however, that Plaster does not come within the term "mixed-blood Indian, being more than one-eighth Indian;" that following the status of the father as to citizenship, he would, technically and strictly speaking, be a white man of mixed blood, and thus immune from the law. While the statute may be subject to this technical construction, we think its intent to proscribe all persons of Indian descent, who have more than one-eighth Indian blood in their veins, is apparent. The words "mixed blood" are equivalent, in our judgment, to the words of the Michigan statute, construed in the case of *People v. Gebhard*, 151 Mich. 192, 115 N. W. 54, the words being that liquor should not be sold "to any Indian, nor any person of Indian descent." The court concluded:

"We think that the language used by the legislature clearly manifest their intention to prohibit not only sales to full-blooded Indians, but to all persons with Indian blood in their veins."

For, as was said by the court:

"The same reason which applies to prohibiting sales to full-blooded Indians applied also to half-breeds. The Indian blood, like the blood of all savage races, is liable to much greater inflammation and excitation than that of civilized races, rendering people otherwise friendly when sober, ferocious and ungovernable when under the influence of intoxicating drink."

"The term 'mixed blood,' used in treaties and in statutes, includes persons of half, or more or less than half, Indian blood, derived either from the father or from the mother." 22 Cyc. 113.

The right to sell or drink liquor is not a constitutional right, but a privilege which the state may grant to one class of its citizens and deny to another class. This proposition is so well established that it will require no citation of authori-

ties to prove that it is in no way obnoxious to the Federal constitution.

Nor does the lack of intent excuse the offense. While it is an axiom of the law that there can be no crime without criminal intent, there are many cases where the execution and enforcement of the law demand that the intent be implied; a presumption flowing from the acts of the parties. This rule has been generally, although not quite universally, applied in the enforcement of statutes passed in aid of the police power of the state, where the word "knowingly" or other apt words are not employed to indicate that knowledge is an essential element of the crime charged. In the statute before us no qualifying words are employed. One who sells, gives, or barters intoxicating liquor to an Indian or one of mixed blood, is guilty. The fact of selling being established, the law supplies the element of intent.

"In these cases there is a voluntary act which the party does at his peril, and he is not to be excused either by ignorance of the law or ignorance of the fact. Either kind of ignorance implies a fault, and it must be assumed that with due diligence the true character of the act could have been ascertained." Freund, Police Power, 635, 636.

See, also, 8 Am. & Eng. Ency. Law (2d ed.), 291, and 12 Cyc. 158, where additional authorities are collected. In the case at bar there is no showing of positive intent, and the legislature, evidently mindful of the peril of the liquor seller in such cases, has provided that the trial judge shall have a wide discretion in fixing the punishment. This is as far as the law goes to relieve the appellant of his inadvertence.

Finding no error in the record, the judgment is affirmed.

RUDKIN, C. J., MORRIS, DUNBAR, and CROW, JJ., concur.

[No. 8950 Department Two. December 10, 1910.]

LORA E. VAN GELDER, *Respondent*, v. HENRY VAN GELDER, *Appellant*.[1]

DIVORCE—ALIMONY. It is error to allow $750 as alimony out of the husband's estate valued at $10,000, upon granting the husband's prayer for a divorce, where the wife had estate of the value of $2,500, and there was no community property for division, and she had inveigled the husband into the marriage relation for the purpose of gaining a share of his property, had brought unfounded charges of cruelty in order to obtain a divorce, and was guilty of cruelty and indignities rendering the husband's life burdensome.

DIVORCE—ATTORNEY'S FEES—COSTS. Allowance of costs and attorney's fees to a wife in an action for divorce is within the discretion of the trial court, although divorce be granted to the husband on his cross-complaint, and will not be disturbed on appeal, where there is no suggestion of abuse of discretion.

Appeal by defendant from a judgment of the superior court for Whatcom county, Hardin, J., entered December 28, 1909, decreeing the payment of alimony, upon granting a divorce to defendant. Modified.

Brown, White & Peringer, for appellant.

Fairchild & Bruce, for respondent.

CHADWICK, J.—Appellant and respondent were married at Bellingham, July 26, 1907. Both had been previously married and each was possessed of some property, appellant having, as the trial judge found, about $10,000, and respondent about $2,500. The property had never been commingled, and was owned separately at the time the decree was entered. The parties came together through correspondence, following an advertisement inserted by appellant in a spiritualistic journal published in Chicago, stating that he desired to secure a housekeeper. There is nothing in the findings of the court to indicate that respondent ever had any real affection for

[1]Reported in 112 Pac. 86.

the appellant, or that his property grew in volume under her influence, or while they lived together as husband and wife. In her complaint, respondent charges appellant with the grossest wrongs and cruelties, all of which were denied by appellant, who filed a cross-complaint setting up a state of domestic infelicity, cruelty, and indignities which rendered his life burdensome. The trial court found all of the material allegations of respondent's complaint to be wholly groundless, and the material allegations of the cross-complaint of appellant to be fully sustained by the evidence. The court further found that the parties had corresponded prior to the time respondent came west, and "the plaintiff sought to and did ascertain from the defendant something of his financial status; that by finesse and various suggestions, statements and acts fully set out in the exhibits introduced on the part of the defendant in this case and admitted in evidence, endeavored to, and did, influence the defendant to enter into the marriage relation with the plaintiff, and that such conduct and acts and suggestions on the part of the plaintiff to and of this defendant were for the purpose of inducing the defendant to marry the plaintiff and to secure a portion of his property, and that the defendant was induced to enter into the said relation because of such statements, acts and suggestions on the part of the plaintiff." The court adjudged that appellant take a decree of divorce upon his cross-complaint, and further, that the defendant pay to the plaintiff as alimony the sum of $1,000, said sum to be paid within sixty days from the date thereof, $250 of which sum was to be paid to J. W. Rose, attorney for plaintiff. To this part of the decree, exceptions were reserved, and from it, this appeal is prosecuted.

A motion is made to strike what purports to be a statement of the facts, being the letters written by respondent to appellant pending the negotiations which culminated in their marriage. These letters are here, being referred to in the findings, "and which said exhibits are made a part of these findings as fully as if specifically set forth herein." No other

certificate of the trial judge was made. It is contended that the exhibits cannot be so considered as a part of the findings, for the reason that they are evidence in the case, and could only be considered when certified as a statement of facts under the appeal statute. But we feel that it is not necessary to pass upon this question, or to refer to the exhibits. The findings of the court are ample to sustain the decree of divorce. Both parties sought a separation, the only question being which one of them should take the decree. The facts found are in no way challenged on this appeal, the only question being one of law, whether from the facts as found by the court it should have allowed respondent the sum of $1,000 out of the property of appellant. Those cases holding that alimony will not as a rule be granted where the wife is at fault can rarely be applied under our community property system. A wife may be at fault and yet be entitled to an allowance, not because of any theory of punishment to the husband, but because the property is her own. So that we will pass the cases upholding the common law rule which have been cited by appellant, and consider the facts and the law of the instant case.

The findings show no equities whatever in favor of respondent. She designedly undertook to, and did, put herself in a legal position where she believed she could demand, at the hands of the law, a share of appellant's property. She charged unspeakable cruelties to insure her cause, all of which the court rejected as unsustained. There was no property requiring division, nor was respondent in necessitous circumstances. There is no ground, in fact, to sustain the arbitrary allowance of $1,000 to respondent, unless it be that she was the legal wife of appellant. This, as we have heretofore held, is not enough. To allow a recovery in this case would put a premium upon the cupidity of a designing woman, and invite the adventuress to invade the property of her victim, sanctioned and encouraged by the law. In *State ex*

rel. Lloyd v. Superior Court, 55 Wash. 347, 104 Pac. 771, we said:

"Alimony or maintenance and counsel fees are not granted as a matter of course or upon the mere allegation of marriage. Neither is the order imposed as a penalty, but to compel the performance of a duty, and must be sustained on equitable grounds, having reference to the relative situation of the parties."

And in *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135, the rule was declared that,

"If she [the wife] be otherwise provided for or have property in her own right, there can be no reason for the assertion of the right to an allowance out of the separate property of her husband."

In all cases of this kind or character, the court should be governed by the facts of the particular case before it. Respondent cast the die and lost. Under such a state of facts, the rule of justice should be to leave the parties as they were at the time of their marriage.

The allowance of attorney's fees and the costs of a particular action is a matter peculiarly within the discretion and province of the trial judge. No reason is suggested, and we find none in the record, which would warrant us in denying that part of the decree allowing attorney's fees in the lower court. This is an allowance, not to respondent, but to her counsel. This case will be remanded with instructions to the lower court to modify its decree, denying the allowance of $1,000, and charging appellant with the sum of $250 as counsel fees in the court below. Neither party will recover costs on appeal.

RUDKIN, C. J., MORRIS, and CROW, JJ., concur.

[No. 9195. Department Two. December 10, 1910.]

In the Matter of the Application of CHARLES W. LITTLEFIELD.[1]

PHYSICIANS AND SURGEONS—LICENSES—DECISION OF MEDICAL BOARD—APPEAL—REVIEW. Rem. & Bal. Code, § 8399, providing for an appeal to the superior court from the decision of the medical board refusing a physician a license to practice, the court on appeal has a right to administer the provisions of the medical act relating to examinations.

SAME—QUESTIONS OF FACT—TRIAL DE NOVO. An appeal from the decisions of the medical board refusing a physician a license to practice, under Rem. & Bal. Code, § 8399, giving a general right to appeal as in other cases, brings up for review all questions of fact, notwithstanding expert evidence may be required to determine the qualifications of the applicant, in view of the provisions requiring a trial *de novo*, and that the examination papers be a part of the record, and that the case stand for trial as an ordinary civil action.

APPEAL—TRIAL DE NOVO—ISSUES. The requirement of a trial *de novo* on appeal to the superior court, only requires a trial upon the matters in issue.

Appeal from a judgment of the superior court for King county, Holcomb, J., entered April 19, 1910, upon findings in favor of the applicant on appeal from a decision of the board of medical examiners, directing the issuance of a license to practice medicine and surgery. Affirmed.

Howard G. Cosgrove and *Higgins, Hall & Halverstadt*, for appellant.

E. P. Dole, for respondent.

DUNBAR, J.—Charles W. Littlefield, the respondent, filed a written application with the board of medical examiners of the state of Washington for a license to practice medicine and surgery in this state, under the provisions of chapter 192 of the session laws of the state of Washington for 1909, page 677 (Rem. & Bal. Code, § 8386 *et seq.*). An examination was

[1]Reported in 112 Pac. 234.

given the applicant pursuant to said act, and upon said examination the board refused to grant the license applied for. Thereafter the applicant appealed to the superior court for King county. After hearing the case, the court entered its judgment, directing the board to issue the license applied for. The court made findings of fact and conclusions of law.

The record shows that the license was refused by the board principally for the reason that the applicant did not obtain a rating equal to sixty per cent on the subjects of histology, pathology, and general diagnosis, which he was required to obtain under the statute before a license could issue to him. The other subjects upon which the law provides for an examination are anatomy, physiology, chemistry, toxicology, bacteriology, gynecology and obstetrics, and hygiene. It is the contention of the appellant, first, that the court had no jurisdiction to hear this case; that it could not administer the provisions of the medical act as applied to appeals from orders of the board denying a license after examination, because it is asserted that it is familiar law that, if the court cannot administer the law on a subject brought before it by virtue of the appellate statute, the court has no jurisdiction, and many cases are cited to sustain this announcement of the law. But this is assuming the very question at issue. It seems to us that, under the statute, the court has the right to administer the provisions of the medical act, for the statute specially provides for an appeal from the decisions of the board. Section 13 of the act provides:

"In any case of the refusal or revocation of a license by the said board under the provisions of this act, the applicant whose application shall be so refused, and the licentiate whose license shall be so revoked by said board, shall have the right to appeal from the decision so refusing or revoking such license within thirty days after the filing of such decision in the office of the secretary of said board, as hereinbefore in this act provided. Such appeal shall be to the superior court in and for the county in which was held the last general meeting of said board, prior to the refusal of such license," etc. Rem. & Bal. Code, § 8899.

And provision is made in the statute for an appeal from the decision of the superior court to the supreme court. It is contended by the appellant that, if this statute is to be given force at all, it must be construed to the effect that the appeal is not from the facts in the case or the merits of the case, so far as the examination is concerned, but only for the purpose of having determined any questions of law arising on the examination or in connection with the same. But the statute is a general one, and confers the general right without any limitations of this kind. So far as the statute itself is concerned, it does not remove from the operation of the appeal questions of fact, any more than it does questions of law.

But it is insisted that it must be construed with reference to the asserted fact that it would be a travesty for the superior court to undertake to pass upon the qualifications of applicants to practice medicine; that it would resolve itself simply into the hearing of expert testimony on questions brought before the court. Difficulties of this kind are presented in the trial of many cases. A common instance is where a defense is based upon the alleged insanity of a defendant in a criminal action. The testimony of alienists and other scientists is the controlling testimony in the case. The legislature evidently was not willing to leave the exclusive and final determination of this question to the discretion of the examining board, but evidently thought that justice and public policy demanded that there should be a review of the action of this tribunal.

It is true, there are some inconsistencies in the act; one of which is the fact mentioned by the appellant that there may be an oral examination which it would not be possible to transmit in the record. But that it was intended by the legislature that the evidence generally should be transmitted to the superior court is evident from the provisions of the statute, for the law requires that the secretary shall, within ten days after the service of such notice of appeal, transmit to the clerk of

the superior court to which such appeal is taken, a certified copy, under the seal of said board, of the decision of said board, and the grounds thereof in the case of the refusal of the license; that the clerk of the court shall docket such appeal cases, and that they shall stand for trial in all respects as ordinary civil actions, and like proceedings be had thereon. It also provides that upon such appeals said causes shall be tried *de novo*, which excludes the idea advanced that only questions of law shall be passed upon by the superior court. It provides that the examination papers shall form a part of the records of the board, and shall be kept on file by the secretary for a period of one year after each examination. All these and other provisions of the statute tend to show that the preservation of such records is in the interest of appeal.

But it is contended by the learned counsel for the appellant that, if the statute is to be literally construed, the proper procedure was not followed in this case, for the court only passed upon the question in the main as to whether the applicant had been properly rated in his examination on the subjects of histology, pathology, and general diagnosis; while the other subjects on which the applicant was examined were not examined by the superior court; that a trial *de novo* is a trial anew, and that a trial anew means the trial of all the questions that were involved in the case below. But it seems to us that this is not a broad view of this statute. Undoubtedly a trial *de novo* does mean, and is generally understood to mean, a trial anew; but it means anew, of course, only as to the questions in issue. This court tries equity causes *de novo*, but if the court in an equity case makes findings of fact, and those findings of fact are not excepted to and no issue is tendered concerning them, it would be idle for this court to spend its time in determining whether the findings were properly made. In this case, so far as the respondent is concerned, he is satisfied with the rating he received on the other subjects of examination, and there is no objection made to them by the appellant. So that they are really not

in issue in the case, and the case was tried *de novo* so far as the issues were concerned.

In some minor particulars, such as the standing of the college from which the applicant received his diploma, and one or two other technical requirements in the presentation of his application, some little objection is made to the findings of the court. But we are satisfied that the findings were substantially justified by the testimony.

Finding no reversible error, the judgment will be affirmed.

RUDKIN, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 8751. Department One. December 10, 1910.]

O. S. LEWIS, *Respondent*, v. CONTINENTAL CASUALTY COMPANY, *Appellant*.[1]

DEATH — INSURANCE — ACCIDENTAL DEATH — INJURIES — EVIDENCE — SUFFICIENCY. In an action on an accident insurance policy precluding recovery for death by drowning, there is no sufficient proof that the insured received a personal bodily injury through external, violent, or accidental causes other than drowning, and that her death resulted from injury, where she went down with the vessel and was seen no more, and it was merely shown that when the vessel sank head first into the sea, other passengers near the insured were thrown violently against the deck and received severe bodily injuries, one rescued passenger having died from such injuries.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 24, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on an accident insurance policy. Reversed.

Manton Maverick, Gill, Hoyt & Frye, and *R. L. Blewett*, for appellant.

B. B. Moser, E. E. Simpson, and *H. T. Granger*, for respondent.

[1]Reported in 112 Pac. 91.

FULLERTON, J.—The appellant, an accident insurance company, issued a policy of insurance to one Mabel B. Lewis, whereby it promised that in the event the insured, while the policy was in force, should receive personal, bodily injury, through external, violent and purely accidental causes, and death should result necessarily and solely from such injury within ninety days after the accident, the company would pay the beneficiary named in the policy the sum of $2,500. The policy contained certain conditions, among which was one to the effect that it did not "cover death . . . which results wholly or in part, directly or indirectly, . . . from drowning." After procuring the policy, the appellant took passage on the steamer "Columbia," from San Francisco, California, to Portland, Oregon. While the steamer was enroute and some fifteen miles off the coast of California, it collided with another steamer, known as the "San Pedro," and sank. The insured perished in the accident, which occurred during the life of the policy. The respondent was the husband of the insured and was named in the policy as the beneficiary thereof. After his wife's death, he made proof thereof to the appellant company and demanded payment of the sum named in the policy. Payment was refused, and this action was begun to recover the same. The cause was tried before the court sitting with a jury, and resulted in a verdict and judgment in favor of the respondent. This appeal was taken therefrom.

While a number of questions are presented by the record, we have found it necessary to notice but one, since we conclude it to be fatal to the respondent's right to recover. By the terms of the policy it was incumbent upon the respondent to allege and prove that his wife received a personal, bodily injury, through external, violent and purely accidental causes, and that her death resulted necessarily and solely from such injury. The evidence introduced to meet this requirement was the evidence of the respondent himself. He testified that, immediately following the collision, some person alarmed the

sleeping passengers, directing them to take life preservers and go on deck, that he and his wife obeyed the call, ascending to the deck by a stairway that took them to the stern of the vessel, and that just as they reached the deck the vessel sank head first into the sea. He testified that up to that time his wife had received no personal, bodily injury of any kind, that she went down with the vessel and was seen no more, her body never having been recovered. He testified further, however, that as the vessel sank he was within reaching distance of his wife; that he was thrown by the water against the hurricane deck and received severe bodily injuries; that of the passengers rescued with him and brought to shore in the same lifeboat, one, a man, died on the way in; that most of the others in the boat were more or less hurt; and that he saw still others in the hospital who were injured.

It is the contention of the respondent that it is reasonably inferable from the evidence that the insured met with a personal, bodily injury at the time of the sinking of the vessel, and that such bodily injury was the proximate cause of her death; or, at least, that the evidence tended to prove that fact, and it was for the jury to draw the deduction. But we think these proofs fall far short of making a case for the respondent. The fact that certain persons aboard the steamer met with personal, bodily injuries when the vessel sank, might raise a presumption that another person who had received bodily injuries obtained them from the same cause, were the causes of the injuries a matter of inquiry, but we think it can raise no presumption that another person perishing by the accident, the cause of whose death is unknown, perished because of having received personal, bodily injuries, especially since there was an all sufficient cause for the death aside from personal, bodily injuries; namely, by drowning.

We have not felt it necessary to review the cases cited by the respondent to sustain his contention. In the main they are cases where it was shown beyond controversy that the insured did receive a personal, bodily injury, and the question was

whether the injury or some intermediate agency was the proximate cause of death. Manifestly these cases are not parallel to the case at bar. Here there was no competent proofs of injury, much less was it proven that the death of the insured resulted necessarily and solely from such injury.

The judgment appealed from is reversed, and remanded with instructions to enter a judgment in favor of the defendant, appellant in this court.

RUDKIN, C. J., GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 8931. Department One. December 12, 1910.]

GERTRUDE BARNUM, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

APPEAL—REVIEW — VERDICT — DAMAGES — EXCESSIVE VERDICT. A verdict for $3,500 will not be disturbed as excessive, where there was a conflict in medical evidence, and the testimony of certain witnesses, if believed, would warrant the verdict.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 1, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger through a collision of street cars. Affirmed.

Morris B. Sachs, for appellant.
Hastings & Stedman, for respondent.

FULLERTON, J.—The respondent was injured while riding as a passenger upon one of the appellant's cars, and recovered therefor in this action in the sum of $3,500. The appellant admits its liability for the accident causing the injury, and its liability to respondent in damages for such injury as was actually suffered by the respondent, but contends that the

[1]Reported in 112 Pac. 85.

verdict of the jury and judgment entered thereon are grossly excessive when measured by such actual injury.

The respondent, at the time of the accident, was riding in the car near the door, in the partition which divides the car into compartments. She was standing up, bracing herself against the side of the door, as the car was so crowded she could not find a seat. As she was in that position, the car met with a head-on collision with another car of the appellant. The shock threw her violently against the door, from which position she fell to the floor and was trampled upon by other passengers.

That the respondent received some severe bruises from the accident and was under the doctor's care for some time thereafter is conceded, the principal dispute being over the question whether the injuries received were of a permanent nature, and were the proximate cause of the apparent arrested development from which the respondent subsequently suffered. On these questions the medical evidence is squarely in conflict. If that offered on behalf of the respondent is to be believed, the amount awarded by the jury is no more than adequate to compensate her for her suffering and injury. On the other hand, if we were to adopt the theory of the appellant's witnesses, it could well be said the damages are excessive. But these matters this court cannot determine with any certainty from the record. Each is supported by evidence and plausible reasoning. We can do no more, therefore, than abide by the verdict of the jury.

The judgment is affirmed.

RUDKIN, C. J., GOSE, MOUNT, and PARKER, JJ., concur.

[No. 9081. Department One. December 12, 1910.]

HENRY ALLEN, *Respondent*, v. CHEHALIS LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—APPROACH TO MILL. A master is not liable to a planerman in a mill who, on invitation of a night watchman, left his working place to eat his lunch at a more suitable place, and upon returning over an unsafe approach to the mill, fell and was injured; although the master had not supplied him with any other suitable place to eat his lunch.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered February 14, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries received by a planerman in a sawmill. Reversed.

Dysart & Ellsbury, C. D. Cunningham, and *W. W. Langhorne*, for appellant.

Harmon & Hull, for respondent.

FULLERTON, J.—The respondent recovered against the appellant for personal injuries, and this appeal was taken from the judgment entered in his favor. The record discloses that the appellant owns and operates a sawmill, consisting of the mill proper in which the machinery for manufacturing lumber was contained, and of a dry kiln used for drying lumber after it had been cut into dimension stuff. Both the mill and dry kiln were surrounded in part by lumber platforms built on the same level and on a level with the floor of the mill, but some eleven feet above the ground. The platforms did not touch each other, the distance between them at the nearest point of approach being eighteen feet. Across this space two walks had been constructed. The first was a walk some six feet in width constructed on a level with the tops of the platforms, and was used as a passageway

[1]Reported in 112 Pac. 338.

for footmen as well as for the purpose of trucking lumber from one platform to the other. It was fastened at one end by hinges to the platform on which it rested, and so arranged as to be lifted up at the other end, the purpose of this being to get it out of the way of cars which were sometimes run along a track laid on the ground midway between the two platforms. The second walk was a way for footmen only. It was elevated sufficiently high to permit cars to pass under it, with steps leading up to it, and was guarded by railings sufficient to make it a safe passageway.

The respondent entered the employment of the appellant on November 9, 1908. He was employed as a planerman, his duty being to operate a planer which was located in the mill proper. The mill was lighted by electricity generated from a dynamo connected with the power that operated the mill machinery, and in consequence, the lights went out whenever the machinery was shut down. At midnight it was customary to shut down the mill for half an hour in order to give the employees an opportunity to eat their meals. The respondent, during the time of his employment, brought a lunch with him and ate it by the light of a lantern. On the night of the 17th of November, the mill stopped as usual, and the respondent proceeded with his co-employees to eat his lunch near the planer. At that moment the night watchman of the mill came along and told the men that a much more comfortable place to eat their lunch was at the dry kiln, and offered to pilot them to it. The men expressed their willingness to accompany him and were taken to a place near the kiln, the way leading across the walk connecting the platforms before mentioned. While the men were eating their lunches, the night watchman left them to attend to his ordinary duties. After the lunch had been finished, and while the mill was still dark, the men started to return to their place of work. They had with them but the single lantern. The respondent lead the way, walking slightly in advance of the man who carried the lantern. On reaching the edge of the

platform he failed to note the exact dimensions of the connecting walk, and either missed the walk entirely or walked diagonally across a corner of it. The result was that he fell to the ground below and received the injury for which he sues.

The respondent rests his right to recover on the contention that he was ordered and directed by the mill company, through its night watchman, to eat his midnight meal at the dry kiln, and that the company had not furnished him with a reasonably safe way from his place of work to the kiln. We can find, however, nothing in the record which supports this contention. The record makes it plain that the night watchman had no power or authority to direct the movements or control the work of the planerman. While they each received their orders from a common source, their duties were separate and distinct, and neither was expected to interfere with the work of the other. The invitation given the respondent by the night watchman to eat his lunch at the dry kiln was not, therefore, a command of the master, and the master was not responsible for the accident that befell him while upon the way.

But it is said that the master owed the respondent the duty to provide him with a suitable place to eat his lunch, and that no such place was provided other than the one at the dry kiln. But this duty would not devolve upon the master in the absence of a special contract. Undoubtedly the appellant owed the respondent the duty to keep the approach to the mill, over which the respondent was required to go to reach his place of work, in such a condition as to enable him to go and return with reasonable safety in case he desired to eat his lunch at a place selected by himself, but this was the extent of its liability in that regard on a mere contract of hire. It did not owe him the duty of providing for him a suitable place in the mill in which to eat his lunch.

The judgment appealed from will be reversed, and the

cause remanded with instructions to enter a judgment in favor of the appellant to the effect that the respondent take nothing by his action.

RUDKIN, C. J., GOSE, MOUNT, and PARKER, JJ., concur.

[No. 8915. Department One. December 12, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. KANDA RISABURO, *Appellant*.[1]

LEWDNESS—LIVING WITH PROSTITUTE—SEX OF ACCUSED—EVIDENCE—SUFFICIENCY. In a prosecution of a male person for living with and accepting the earnings of a prostitute, the objection that there was no evidence that he was a male person is without merit, where he appeared before the jury, responded to masculine pronouns addressed to him, and his sex was not made an issue.

SAME—ACCEPTING EARNINGS—EVIDENCE—SUFFICIENCY. A conviction of living with and accepting the earnings of a prostitute, is supported by evidence of confessions and admissions, and the fact that the accused had lived for years with the same prostitute without other visible means of support.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered January 24, 1910, upon a trial and conviction of living with and accepting the earnings of a common prostitute. Affirmed.

E. C. Dailey, for appellant.

Everett J. Smith, for respondent.

RUDKIN, C. J.—This is an appeal from the judgment and sentence of the court below, convicting the appellant of the crime of living with and accepting the earnings of a common prostitute. Insufficiency of the evidence to justify the verdict is the only error assigned. The appellant first contends that there is no evidence in the record tending to show that he is a male person, and secondly, that there is no sufficient

[1]Reported in 112 Pac. 85.

evidence that he accepted the earnings of the prostitute in question, whose character and calling are admitted. These assignments are wholly without merit. Conceding that it was incumbent on the state to prove that the appellant was a male person, and that there is no direct evidence in the record to that effect, the fact remains that the appellant appeared before the jury, and responded repeatedly to masculine pronouns addressed to him during the trial, without objection or protest. Any bystander might have testified that the appellant was a male person from his appearance only, and the jury might properly draw the same inference. The sex of the appellant was not made an issue during the trial, but was accepted by all parties concerned as a conceded fact, and under such circumstances the question will not receive serious consideration here. *Lewis v. People*, 37 Mich. 517.

It is next contended that there is no evidence tending to show that the appellant accepted any earnings of the prostitute; but if confessions and admissions go for aught in a court of justice, there is ample testimony on that point also. Aside from this, there was abundant evidence that the appellant has lived with this same prostitute for a number of years, at different points, and has no other visible means of support.

The judgment is affirmed.

FULLERTON, GOSE, MOUNT, and PARKER, JJ., concur.

[No. 9029. Department One. December 12, 1910.]

WILLIAM A. SEXSMITH, *Respondent*, v. GEO. A. BROWN *et al.*, *Appellants*.[1]

APPEAL—REVIEW—LAW OF CASE—INSTRUCTIONS. Instructions, not excepted to, become the law of the case.

APPEAL—REVIEW—VERDICTS. Findings of a jury, supported by competent evidence, are conclusive on appeal.

NEW TRIAL—AFFIDAVITS OF JURORS—IMPEACHING VERDICT. Affidavits of jurors in support of a motion for a new trial cannot be received to affect matters that manifestly inhere in the verdict.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered December 18, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a promissory note. Affirmed.

Canton & Hensel, for appellants.

W. A. Reneau, for respondent.

RUDKIN, C. J.—This action was instituted by the plaintiff to recover from the defendants the sum of $373.50, according to the terms and conditions of a certain promissory note, executed by the latter in favor of the former on the 28th day of July, 1902. The sole issue in the case was presented by a plea of payment. The case was tried before a jury, and from a judgment in favor of the plaintiff, according to the prayer of his complaint, this appeal is prosecuted.

The promissory note in suit was secured by a chattel mortgage on certain horses and other personal property belonging to the appellants, who offered testimony tending to show that, on or about the 1st day of September, 1903, they sold and delivered to the respondent four head of these horses and a set of double harness, in full payment and satisfaction of the note and mortgage. The respondent, on the other

[1]Reported in 112 Pac. 337.

hand, offered testimony tending the show that the horses and harness were turned over to him as mortgagee, with authority to sell and dispose of the same and apply the proceeds of the sale on the note and mortgage; that the horses were taken from his possession by the sheriff of Douglas county, under and by virtue of writ of attachment issued against the property of the appellants, and were thereafter sold by the sheriff to satisfy a judgment against the appellants in the attachment suit. On the issues thus presented, the court instructed the jury as follows:

"This narrows this controversy between these two parties down to a single question:—Did Sexsmith accept and receive the horses and harness in question in satisfaction and full payment of his said note and mortgage against Brown?

"If you find from a fair preponderance of the evidence that Sexsmith and Brown mutually agreed that Sexsmith should take the four horses and the harness in question as and for his own property, and in consideration thereof release Brown from any further obligation on said note and mortgage—and that in pursuance of such an agreement Brown delivered the horses and harness to Sexsmith for the purpose of extinguishing the debt evidenced by the note, and that Sexsmith accepted the property for the same purpose, then I instruct you that the note and mortgage would be fully paid and satisfied, and your verdict should be for the defendant, Brown. In such case the title to the horses and harness would pass to Sexsmith—they would become his property solely and exclusively —and if the horses were afterwards taken from him, rightfully or wrongfully, the loss would be his, and not Brown's.

"On the other hand, if Sexsmith did not take the horses in satisfaction of the note against Brown, but took possession of them merely as mortgagee for the purpose of selling them, only, and applying the proceeds on the note, and they were afterwards taken from him and lost to him, without any fault of his own, then, I instruct you, there would be no payment of the note in question, and your verdict should be for the plaintiff, Sexsmith.

"If, as claimed by Sexsmith, he took possession of the horses as mortgagee only, and they were afterwards taken from him by the sheriff under a writ of attachment based on a suit then pending against Brown, by a third party, then I

instruct you that Sexsmith would have been entitled to recover the property from the sheriff by appropriate action in this court, and thereafter sell the horses under his mortgage lien, had he chosen to do so, but he would have been under no obligation to prosecute such an action by reason of any duty resting upon him as mortgagee. He would have had the right, if he saw fit to do so, to waive his mortgage and the lien created thereby, and rely solely and exclusively on his note."

These instructions were not excepted to and have become the law of the case, so that we are not called upon to determine whether any other or higher duty devolved upon the respondent as a mortgagee in possession than that imposed by the court below. Under these instructions the jury found that the horses and harness were not turned over or delivered to the respondent in payment or satisfaction of the debt, and their findings are supported by competent testimony. This, under the charge of the court, was the only issue in the case.

The matters set forth in the affidavits of jurors, filed in support of the motion for a new trial, so manifestly inhere in the verdict that the assignment of error based on the order denying the new trial requires no special consideration. Finding no error in the record, the judgment is affirmed.

FULLERTON, GOSE, MOUNT, and PARKER, JJ., concur.

[No. 8767. Department One. December 12, 1910.]

C. L. JONES, *Respondent*, v. OLAF NELSON, *Appellant*.[1]

MECHANICS' LIENS—CONTRACT—MODIFICATIONS—EVIDENCE—SUFFICIENCY. The evidence in a mechanics' lien case supports findings to the effect that an agreed length of a building was reduced two feet to avoid having cornices extend over the lot lines, where one of the parties so testified and was corroborated by the circumstances.

DAMAGES—CONTRACTS—BREACH—DELAY IN COMPLETING BUILDING. Damages for a month's delay in completing a flat, built for rent, are properly disallowed, where there was no proof of applications for rent during the time or other competent evidence of damage, and interest on a large balance due was only computed from one month after the completion of the building.

APPEAL—REVIEW—FINDINGS. Findings upon directly conflicting evidence of witnesses, seen and heard by the trial court, should not be disturbed on appeal.

APPEAL—REVIEW—HARMLESS ERROR—NEW TRIAL. Upon a trial *de novo* in the supreme court, the denial of a motion for a new trial, heard in the wrong county, is not prejudicial, the new trial having been properly denied.

Appeal from a judgment of the superior court for King county, Clifford, J., entered December 13, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

Guie & Guie, for appellant.

Kerr & McCord, for respondent.

GOSE, J.—This is a bill in equity for the foreclosure of a mechanics' lien. On August 26, 1908, the respondent entered into a building contract with the appellant, Olaf Nelson, acting through one Anderson as his attorney in fact. By the terms of the contract the respondent agreed to erect for the appellant, Nelson, hereafter called the appellant, a two-story frame building consisting of twelve flats, six of five rooms each, and six of four rooms each. Respondent agreed to fur-

[1]Reported in 112 Pac. 88.

nish the labor and material and complete the building on or before December 15, 1908. It was further agreed that the building should be "an exact duplicate" of a building theretofore erected by the respondent for one Mays, except that it should be four feet longer. The Mays building was 108 feet in length. The contract price was $7,000. Two thousand dollars was paid before the commencement of the action. The appellant claims an offset in damages to the extent of $3,888.15, on account of a shortage of two feet in the length of the building, and for defective work and inferior material. There was a judgment for the respondent for $5,000, the balance of the contract price, and for $493.75 for extra work, for attorney's fees and costs, and a decree establishing and foreclosing the lien. Nelson has appealed.

The appellant first contends that the building as constructed is only 110 feet in length instead of 112 feet, as the contract requires. Upon this feature of the case the court found:

"The defendant contended in this action that the building constructed by the plaintiff was from eighteen inches to two feet shorter than required by the contract. I find from a preponderance of evidence that at the time the plaintiff was ready to commence the construction of said building the dimensions of the building were made the subject of discussion between the plaintiff and the agent and attorney in fact of the defendant and that under an agreement then entered into a ground dimension slightly shorter than the length of the lot was determined on, but that the cornice and bay windows of said building practically reached to the limits of said lot, and that it was constructed upon a plan satisfactory to the defendant to avoid any possible controversy with the building inspector of the city of Seattle."

We think the finding is supported by the evidence. The respondent testified that the lot was represented to him to be 114 feet in length, but that when measured it was found to have a length of 112 feet; that he had had trouble with the city inspectors when attempting to put the cornice and windows of other buildings over the street, and that he so

informed Anderson, the appellant's attorney in fact, and that the latter said to him that he need not so extend it. His testimony is supported by the circumstances of the case. The agent was around the building while it was being constructed, and no complaint was made as to its length until after the commencement of the action. Including the cornices, the building is 111 feet, four inches. Measured on the foundation line, it is 110 feet, six inches. One of the appellant's witnesses stated that, when constructed, $75 would have covered the expense of extending the base of the building to the exterior lines of the lot. In the light of the record, we cannot say that the learned trial court committed error in the finding quoted.

It is next insisted that the building was not completed within the time fixed by the contract, and that the appellant should have been allowed an offset in damages. The court found:

"It was contended by the defendant that the building was not ready for occupancy on December 15, 1908, the time fixed in the contract, but the court finds that there is no competent evidence that the defendant sustained any damage by reason thereof, and that the delay in that behalf was due largely to the inclemency of the weather."

The respondent testified that the building was ready for occupancy on December 15, the date fixed for its completion, and that the appellant took possession January 22 following.

Damages, in legal acceptation, mean compensation for the loss suffered or the injury sustained. The flats were built for renting. There is no evidence that there were any applications for rooms before the completion and delivery of the building. Damages will not be awarded unless they are based on something more substantial than guess, assumption, or speculation. *McCarthy v. Gallagher*, 4 Misc. Rep. 188, 23 N. Y. Supp. 884. Interest was allowed only from February 15, 1909, the date of the filing of the lien. This, we think, afforded the appellant ample compensation for the delay, if any, in the completion of the building.

It is next urged that the appellant should have been allowed a large sum as damages arising from defective material and bad workmanship. The appellant's witnesses fixed the damages from these sources from $2,000 upwards. The court found that "the material and labor used in its construction were practically the same to all intents and purposes as that used in the construction of the Mays building of which it was to be a duplicate; that the defendant has failed to sustain any claim for damages by reason of either the labor or material used in the construction thereof." If we accept the testimony of the appellant's witnesses, both the material and workmanship were inferior to that in the Mays building. Indeed, it appears from their testimony that the quality of the workmanship is extremely bad. If, however, we adopt the testimony of the respondent's witnesses, the finding of the court is correct. No claim was made for much the larger part of the damages now claimed until after the commencement of this action. The trial court saw and heard the witnesses, and this is peculiarly a case where that advantage should turn the scale in favor of its findings. We have carefully read the testimony, comprising more than four hundred pages exclusive of the exhibits, and are constrained to concur in the findings of fact of the learned trial court. A more detailed review of the evidence would be of no value, either to the parties to the suit or to the bar.

Finally, it is said that the motion for a new trial was heard and decided in Pierce county, and that this was error. The record shows that the motion was denied in King county in open court. Accepting, however, the statement of counsel for the appellant, it was error without prejudice. The case is tried here *de novo*. The motion for a new trial was properly denied. *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383.

The judgment is affirmed.

Rudkin, C. J., Fullerton, Parker, and Mount, JJ., concur.

[No. 9059. Department One. December 12, 1910.]

FRANK NAPPLI, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

STREET RAILROADS—COLLISIONS—CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The driver of an express wagon is not guilty of contributory negligence, as a matter of law, in attempting to cross a street car track at a street crossing in front of a car from 100 feet to a block away, approaching a crossing where all cars come to a full stop, he having the right to assume that the car was under control.

Appeal from a judgment of the superior court for King county, Shackleford, J., entered March 7, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by the driver of a wagon through collision with a street car. Affirmed.

Morris B. Sachs, for appellant.

William C. Keith (*E. F. Keinstra*, of counsel), for respondent.

MOUNT, J.—The defendant prosecutes this appeal from a judgment rendered on the verdict of a jury in an action for personal injuries. The injury occurred to the plaintiff on April 6, 1908, between the hours of five and six o'clock in the evening. He was driving a team of horses hitched to an express wagon across the tracks of the appellant company, in Seattle, where Dearborn street crosses Rainier avenue, when one of the defendant's cars ran upon him, killed his team, and severely injured the plaintiff. The complaint alleged that the car was running at an excessive rate of speed. The defense was a general denial, and also that the plaintiff was guilty of contributory negligence. The action was tried to the court and a jury, and verdict was returned for the plaintiff in the sum of $3,500. After motion for new trial was denied, judgment was entered upon the verdict, and defendant has appealed.

[1]Reported in 112 Pac. 89.

Several assignments of error are made, but the only question upon which a reversal is urged is that the court should have directed a verdict for the defendant. It appears that the appellant operates a line of double track electric street railway on Rainier avenue in the city of Seattle. This avenue runs north and south. On the west of the railway track the street is planked and used for general travel. On the east of the tracks the street is not improved and is not used. Dearborn street crossed Rainier avenue at right angles. From Dearborn street north, Rainier avenue is straight for four blocks to Jackson street, where another electric street car line crosses Rainier avenue, and where cars always come to a full stop. On Rainier avenue there is a steep down grade, about nine per cent, all the way from Jackson street south to Dearborn street.

On the evening of April 6, 1908, about 5:30 p. m., when it was daylight, the respondent was driving south on the west side of the railway tracks on Rainier avenue between Jackson and Dearborn streets. When he came to Dearborn street he attempted to cross east over the railway tracks, when he was run down by the car. He testified that, before he came to the crossing, he looked back three different times to see if the car was coming, and saw nothing; that he looked back the last time when he was within twenty-five feet of the crossing, and saw no car; that when he drove upon the street car tracks, one wheel of his wagon dropped into a hole between the tracks, and while his horses were pulling on the wagon, the car struck him. Some witnesses testified on his behalf that, when respondent drove upon the track, the car was a block away; others, that it was one hundred feet away, coming down grade from Jackson street to Dearborn street and running at sixty miles an hour. It is agreed that the city ordinance prohibited a greater rate of speed than twelve miles per hour for street cars within the business and settled residence district of the city.

The question in the case is whether the court should have

said, as a matter of law, that the respondent was guilty of contributory negligence in crossing the street car tracks as he did. If respondent drove his team in front of a car which he knew, or should have known, was coming down upon him and could not be stopped, he is himself negligent and cannot recover. The rule, we think, is correctly stated in *McCarthy v. Consolidated R. Co.*, 79 Conn. 73, 63 Atl. 725, and cited by the appellant, as follows:

"At highway crossings, a street car has no paramount right as against any other vehicle approaching on the cross street. The right attaching to each is equal, and must be exercised with due regard to that attaching to the other, and so as not to interfere with or abridge it unreasonably. It is not necessarily the duty of the driver of an approaching team to wait until the street car has passed, nor is it necessarily his right to push on and cut off its advance. Each party must act reasonably under all the attending circumstances. The driver of an ordinary vehicle can, under ordinary circumstances, be justified in proceeding, at a highway crossing, to go over a street railway in the face of an approaching car, when, and only when, he has reasonable ground for believing that he can pass in safety if both he and those in charge of the car act with reasonable regard to the rights of each other. The duty to slow up or stop, if necessary to prevent a collision, rests equally on each party. In practical effect these doctrines give any railroad car approaching a highway crossing, what amounts to a right of precedence. This follows from the rule respecting contributory negligence. No man has the right to calculate close chances as to his ability to reach the track before the car, and throw the risk of injury on the other party. As to whether the chances were close, however, and the railroad company were not the one really in fault, or whether the party injured did not push forward under circumstances of emergency which left him no time for calculation, will ordinarily be a question for the jury."

In this case, assuming that the respondent should have seen the car before he drove upon the track because the car was evidently in plain view at that time, it was one hundred feet or possibly a block away. Under these circumstances,

we think it cannot be said, as a matter of law, that the respondent should not have attempted to cross over the tracks. He had a right to assume that the car was under control and, when the car was that far away, that he would be in no danger and might pass in safety without risk of danger. At any rate the question whether he was negligent in attempting to cross the track when the car was that far away was a question for the jury. Street crossings are to be used, and the mere fact that an approaching car is in sight does not determine the right of a traveler to cross. His right depends upon what a reasonably careful man would do under the circumstances. If the approaching car is so close and coming so fast that it cannot be stopped in time to avoid a collision, and such facts are or should be observed, then a person attempting to cross may be said to be negligent as a matter of law. But where an approaching car is far enough away to be stopped after a person has passed upon the tracks, or when a reasonably careful man would undertake to cross ahead of it, then it cannot be said, as a matter of law, that a person attempting to cross is negligent. This rule was substantially applied in *Denny v. Seattle, Renton & Southern R. Co.*, 60 Wash. 426, 111 Pac. 450.

The question of negligence of the respondent was therefore properly referred to the jury, and the judgment must be affirmed.

RUDKIN, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9253. Department One. December 12, 1910.]

HERBERT SMITH *et al.*, *Respondents*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

APPEAL—REVIEW—VERDICT—DAMAGES—EXCESSIVE VERDICT. A verdict for $6,500 for personal injuries, reduced by the trial court to $4,000, will not be set aside as excessive, where the injury was substantial, and the trial judge was better able to arrive at a just conclusion than the appellate court.

Appeal from a judgment of the superior court for King county, Gay, J., entered August 31, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger alighting from a street car. Affirmed.

James B. Howe and *H. S. Elliott*, for appellant.

A. R. Rutherford and *Milo A. Root*, for respondents.

PER CURIAM.—This is an action to recover for injuries to the person of the respondent Georgia E. Smith, resulting from the sudden starting and stopping of one of appellant's street cars in the city of Seattle. Mrs. Smith was at the time a passenger upon the car. Appellant admitted liability for the injury, and the case was tried to the jury solely upon the amount of damages. A verdict was returned for the respondents in the sum of $6,500. Upon motion for a new trial, the court entered an order granting the motion, unless the respondent would remit $2,500 from the verdict. The remission was made, and a judgment was entered against the appellant for $4,000. This appeal followed.

The only question presented is that the amount of the judgment is still excessive. If the testimony of the injured plaintiff and that received in her behalf is to be believed, she suffered, and still suffers, substantial injury on account of the accident. We think it is unnecessary to discuss the

[1]Reported in 112 Pac. 87.

character of the injury or the evidence. It is sufficient to say that we have read the evidence, and have concluded that the injury is substantial, and that the trial judge, having made a material reduction after having seen and heard the witnesses, is better able to arrive at a just conclusion than we are.

We conclude, therefore, that the judgment as it stands is not excessive, and must be affirmed.

[No. 8904. Department Two. December 12, 1910.]

A. D. McADAM, *Respondent*, v. C. E. RUSSELL, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR. Error in instructions are harmless where the jury was not misled, and the only question in the case was one of law for the determination of the court.

CONTRACTS—BUILDING CONTRACT — PERFORMANCE. Failure to put saddle boards on the ridge pole of a house, when the total cost of doing so would not exceed one dollar, and which were not in the specifications and are not put on all houses, does not amount to non-performance of a building contract preventing a recovery of the contract price.

Appeal from a judgment of the superior court for Snohomish county, Carey, J., entered November 20, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Padgett & Bell, for appellant.

Robert McMurchie, for respondent.

PER CURIAM.—This was an action brought by the plaintiff to recover the contract price agreed to be paid by defendant in the sum of $490, upon the completion of an addition to a certain building, besides the sum of five dollars as an extra. After the building was substantially completed, the plaintiff claiming that it was completed according to the contract on

[1]Reported in 112 Pac. 345.

July 28, 1909, and the defendant claiming that there had been some slight failure to complete the building, it was destroyed by fire on August 2, without fault of either party it is conceded. . The defendant refused, on demand, to pay the contract price for the building. Trial was had, and a verdict rendered in favor of the plaintiff.

Appellant assigns as error some of the instructions of the court. But we think the instructions correctly stated the law, with the possible exception of the use of the words "preponderance of testimony" in one of them, and we feel certain, from an examination of the whole instruction, that the jury were in no way misled by this. In any event they become immaterial, for the reason that this case really presents a question of law rather than of fact, as under the conceded facts the only thing that was left to be done by the contractor was the putting of what are called "saddle boards" on the ridge of the roof. While we think the jury rightly reached the conclusion from the evidence that such boards were not necessary for the completion of the building, and were not within the contemplation of the contract, at the most this was too trifling a matter for the law to take notice of, the testimony being that the whole cost of the saddle boards, including labor and material, would not exceed one dollar. The testimony shows that these boards were not put on all houses. They were not called for in the specifications, and it was a matter of choice whether or not they should be put on. At most it was a trifling omission, and we think one which was seized upon by the appellant to aid him in escaping from the payment of a just debt.

The judgment is affirmed.

[No. 8951. Department Two. December 12, 1910.]

C. E. RUSSELL, *Respondent*, v. J. A. MITCHELL *et al.*, *Appellants*.[1]

APPEAL—RECORD—STATEMENT OF FACTS—TIME FOR FILING. Under Rem. & Bal. Code, § 393, a statement of facts not filed within the time required by law, when no extension has been granted, will be struck out, and the judgment affirmed where no questions are presented outside of the statement.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered November 22, 1909, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of replevin. Affirmed.

Quinby & Beagle, for appellants.

Padgett & Bell, for respondent.

PER CURIAM.—This is an action in replevin, tried by the court. The respondent moves the court to strike the statement of facts herein and affirm the judgment of the lower court, for the reason that the statement of facts was not filed and served within thirty days from the date of the entry of the judgment, and that no legal order for an extension of time for filing and service thereof had been made by the court. The record showing this state of facts, this motion must be sustained, by reason of the uniform holdings of this court.

The appellants, in answering this motion, rely upon the case of *Dodds v. Gregson*, 35 Wash. 402, 77 Pac. 791, but we are unable to see that that case in any way sustains their theory. The court in the case cited denied the motion, upon the ground alone that a stipulation had been made extending the time for filing the statement of facts; and distinguished the other cases cited by the respondent in that case on that ground alone. There is no stipulation in this case, and no showing that any order extending the time was made. Rem. &

[1]Reported in 112 Pac. 250.

Bal. Code, § 393, provides that a proposed bill of exceptions or statement of facts must be filed and served either before or within thirty days after the time begins to run within which an appeal may be taken from the final judgment of the case. The record in this case shows that the statement of facts was not filed or served within thirty days after the time began to run, or after the entry of the judgment, and that there was no order obtained to extend the time. In *State v. Seaton*, 26 Wash. 305, 66 Pac. 397, in passing upon this question, it was said:

"The due administration of justice requires that the rules relating to the time in which an appeal shall be taken and perfected be definite and fixed. Anything else is confusion. And it would seem that, had it been intended by the legislature that the rules fixing these times should be enforced or ignored as the courts might, in the exercise of their discretions direct, it would have said so in terms, and not left it to be inferred from language couched in loose generalities and of doubtful interpretation."

To the same effect: *Wollin v. Smith*, 27 Wash. 349, 67 Pac. 561; *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31, 67 Pac. 374; *Jones v. Herrick*, 33 Wash. 197, 74 Pac. 332; *State v. Yandell*, 34 Wash. 409, 75 Pac. 988; *Driscoll v. Dufur*, 45 Wash. 494, 88 Pac. 929; *State v. Aschenbrenner*, 45 Wash. 125, 87 Pac. 1118. Under the rule announced in these cases, the motion to dismiss must be sustained, and the statement of facts stricken.

As there is no question arising upon the pleadings, and as the judgment is warranted by the facts found by the court, it will be affirmed.

[No. 9045. Department Two. December 12, 1910.]

STETSON & POST LUMBER COMPANY, *Respondent*, v. W. & J. SLOANE COMPANY, *Appellant*.[1]

MECHANICS' LIENS—NOTICE OF CLAIM—AMENDMENT—LIMITATIONS. Upon the trial of an action to foreclose a mechanics' lien, a notice of a lien against the entire premises may be amended to claim a lien against the leasehold interest only of one who was alleged to have an unknown interest or lien upon the property; and it is immaterial that the amendment was made after the time for filing such a lien had expired, amendments being liberally allowed in all cases by Rem. & Bal. Code, §§ 1134, 1147, regardless of such limitations.

SAME—BUILDINGS—WHAT CONSTITUTES—FIXTURES. A structure is of such a permanent and substantial nature as to be lienable for materials used in the "construction and erection of the building," where it appears that the first tenant of a new store building was given consent to and did build a mezzo or balcony floor commencing at the rear of the storeroom, extending about forty feet toward the front, and from side wall to side wall, connected with the lower floor by a stairway, the floor being upon girders supported by uprights, it being impossible to say how the fastening was made to the side walls or the lower floor without a prying apart; although as between landlord and tenant it may have been viewed as a trade fixture.

MECHANICS' LIENS—FORECLOSURE—PLEADING—VARIANCE. It is not a fatal variance for a mechanics' lien notice to claim a lien for the construction and erection of a building, and to prove an alteration or improvement of a new building by the addition of a mezzo or balcony floor, where the party could not have been actually misled to his prejudice, within Rem. & Bal. Code, § 299, which is applicable to lien cases; especially where the building had never been occupied and the contractor may have taken it to be part of the original plan.

Appeal from a judgment of the superior court for King county, Main, J., entered March 12, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a materialman's lien. Affirmed.

Kerr & McCord, for appellant.

Jay C. Allen, for respondent.

[1]Reported in 112 Pac. 248.

MORRIS, J.—Appeal from a decree establishing and directing the foreclosure of a materialman's lien. The errors assigned are insufficiency of the notice, variance between the pleading and the proof, and that the work was not lienable.

The material was furnished by respondent to Wallace, who, under contract with appellant, built a balcony floor in the building owned by defendant Maud and of which appellant was lessee for a term of years. The notice states that the material was furnished to Wallace, agent for Maud, the owner, and was used in the construction and erection of the building, and

"That said W. & J. Sloane Company, a corporation, has or claims to have some interest in or lien upon the said premises, the exact nature of which this claimant is ignorant, but such interest or claim, if any, is subsequent, junior, subordinate and inferior to the rights and lien of this claimant."

The complaint, in so far as here material, is substantially the same as the notice. Wallace defaulted, and defendant Maud and appellant answered, denying the allegations of the complaint, and setting out the interest of appellant as that of lessee. Upon the trial, which was more than ninety days after the furnishing of the material, the court permitted the complaint and notice to be amended. The nature of the amendment is thus referred to in the findings of fact:

"That after the introduction of the testimony, the court permitted the plaintiff's lien to be amended so as to be a lien upon the leasehold interest held by the said W. & J. Sloane Co., and also permitted the amendment of the complaint to be made accordingly."

It then entered its decree establishing the lien against the leasehold estate of W. & J. Sloane Company, and providing for its foreclosure, and the company appeals.

The defect in the notice, claimed by appellant, is the failure to refer to the lease of Sloane Company, or to claim a lien upon the leasehold estate. This, appellant suggests, was not cured by the amendment, and that the amendment came

too late in that it was permitted after the expiration of the statutory time for filing lien. If it were not for the amendment, this claim of error would have much force. We think, however, the amendment cured the defect, if any, and that the fact that it was made after the expiration of ninety days is immaterial. Many cases hold in accordance with appellant's contention, both as to the defect in the lien and the lateness of the amendment, but such holdings are made under statutes not as liberal in their provisions for amendment as ours, and therefore we do not regard them as controlling; or if made under statutes permitting amendments, are not in accordance with the rules heretofore announced by this court. We can only refer to the amendment in the language of the findings above quoted, as we fail to find the amendment in the record. If the effect of it was as indicated by the court in its finding, then there is no question in our minds as to its efficiency. Neither did it come too late. The rule of amendment established by this court is that amendments of this character are in the nature of amendments to pleading, and the same liberal rule as to substance and time should be followed where the interests of third parties are not injuriously affected. Such is the plain import of our statute. Rem. & Bal. Code, §§ 1134, 1147; *Sullivan v. Treen*, 13 Wash. 261, 43 Pac. 38; *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 60 Pac. 156; *Malfa v. Crisp*, 52 Wash. 509, 100 Pac. 1012. Other jurisdictions, with similar amendment statutes, adopt the same rule. *El Reno Elec. Light & Tel. Co. v. Jennison*, 5 Okl. 759, 50 Pac. 144, wherein the court says:

"If this provision authorizing amendments does not allow an amendment to be made after the time for filing the lien has expired, then it would just as well never have been written. . . . So long as a party's time for filing a mechanic's lien had not expired, he could file as many statements in his effort to make a good lien as he chose."

See, also, *Blanshard v. Schwartz*, 7 Okl. 23, 54 Pac. 303; *Real Estate & Imp. Co. v. Phillips*, 90 Md. 515, 45 Atl. 174; *Thirsk v. Evans*, 211 Pa. St. 239, 60 Atl. 726.

The second error claimed is based upon the statement in the lien notice that the materials for which the lien was claimed were used in the construction and erection of the building, appellant contending the proof to show the materials were used for the alteration and improvement of the building, and that this is a fatal variance. The building was new and appellant was the first tenant. Upon moving in it desired more room for storage of its goods, and with consent of the owner, it employed Wallace to construct what witnesses called a mezzo or balcony floor, commencing at the rear of the store room and extending about forty feet toward the front, and from side wall to side wall. It was connected with the lower floor by a stairway, and was supported by 4x4's and 4x6's, set upright on the lower floor. It is not shown how these uprights are fastened to the lower floor. They stand against the inside wall and down the center, and are about seven feet high. Upon the top of these, girders are strung, from which stringers extend across the room from girder to girder. A floor is laid upon these stringers. Witnesses say it could not be told how the fastening was made to the side walls or the lower floor, without a prying apart, but that it has the appearance of a permanent and substantial structure. It is also shown that the court below, upon request of the parties and in order to better satisfy his mind as to the character of the structure, made a personal investigation of it. What he learned or discovered upon this visit to the building does not appear in the record. We assume, however, from the findings that he was convinced that the structure was of such a character as to be lienable. It may be that, as between the owner and appellant, it was viewed as a mere trade fixture and subject to removal at the end of the tenancy, but this we think is by virtue of their agreement and understanding to that effect. It appears to us, from the description in the record, it is a part of the storeroom and building, and of such a permanent and substantial nature as to be lienable.

Neither was there a fatal variance. Under our practice no

variance is material, unless it shall actually mislead the adverse party to his prejudice in maintaining his defense. Rem. & Bal. Code, § 299. This statute is applicable to lien cases. *Olson v. Snake River Valley R. Co., supra.* Appellant could not have been misled. It had but one contract with Wallace, and that was for the construction of this structure. It was plain from the notice of lien and the complaint of foreclosure that the materials for which the lien was claimed were furnished Wallace for use in this structure. Again, the building was new; it had never been occupied. Respondent could hardly be expected to know whether the building of this floor was included in the original plans and specifications of the building or not. He saw this work being done in a new building, and he had a right to assume it was part of the original construction. Had it been in an old building it might be he would not be justified in regarding it as "construction," but should have known it was "alteration, improvement or repair." We do not think there was such variance, if at all, as can be of any beneficial use to appellant on this appeal.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, CROW, and CHADWICK, JJ., concur.

[No. 9149. Department Two. December 12, 1910.]

MAURICE GERBER, *Respondent*, v. AETNA INDEMNITY COMPANY, *Appellant*.[1]

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS—TIME FOR TAKING. Exceptions to instructions, not taken at the trial but filed in writing with the clerk thereafter, are not taken in time, and error cannot be assigned thereon.

SAME—MANNER OF TAKING. An oral request for qualification of instructions about to be given, and argument thereon wherein appellant's counsel claimed that it would be error to refuse the re-

[1]Reported in 112 Pac. 272.

quest, cannot take the place of exceptions, and error cannot be assigned thereon when no exceptions were taken to the action of the court.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 19, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Peters & Powell, for appellant.

Jay C. Allen, for respondent.

MORRIS, J.—The only errors suggested on this appeal are in the giving and refusing to give instructions; and we are met at the outset by a motion to affirm the judgment upon the ground that the record shows no proper or sufficient exceptions taken to the errors assigned. The trial was had on October 19, 1909. No exceptions appear to have been taken to the instruction now complained of, nor to the refusal to give the one offered. On October 28, however, appellant filed its exceptions with the clerk. So far as the record goes, this appears to be all that was done in this connection. Under the rule announced in *Coffey v. Seattle Electric Co.*, 59 Wash. 686, 109 Pac. 202, this was not a proper or sufficient exception, and the motion to affirm is well taken.

Appellant contends that it brings itself within the rule announced in the *Coffey* case by taking a proper exception to the court during the trial. It appears that, during the giving of the instructions, counsel for respondent interrupted the court and called its attention to what he deemed was an improper statement of the law, and asked the court to then and there correct it. The court thereupon dismissed the jury and heard from counsel as to their respective contentions in this regard. After some argument, the court seemed inclined in respondent's favor. Counsel for appellant thereupon, among other things, said to the court:

"I submit the matter to your honor's consideration, and I think that should you make the other qualification of the

instruction, it will be error. All three of these cases refer to another condition, to the first branch of the contract."

Further argument was then heard by the court, and counsel again stated:

"I do not want to take advantage of the record, but I am satisfied that that would be error, because it refers to an entirely different condition . . . "

We cannot hold, when during the argument upon a legal contention counsel indicates to the court his contention that the court is about to make an erroneous ruling, that such expression of counsel's view will operate as, and take the place of, an exception to the ruling. Exceptions, and the manner of taking the same, are controlled by statute, and to be beneficial the statutory requirement must be followed.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, CROW, and CHADWICK, JJ., concur.

[No. 8969. Department Two. December 12, 1910.]

C. F. GRAFF, *Appellant*, v. THE CITY OF TACOMA *et al.*, *Respondents*.[1]

APPEAL — DISMISSAL — CESSATION OF CONTROVERSY. Upon appeal from the dismissal of an action to enjoin a city from letting a contract for a city bridge, there is no cessation of the controversy warranting a dismissal of the appeal from the fact that the city has since let the contract to enjoin which the action was commenced.

MUNICIPAL CORPORATIONS—CONTRACTS—BRIDGES—COMMISSIONER OF PUBLIC WORKS—POWERS—AWARDS—BIDS. Under Tacoma city charter, §§ 129, 130, making the commissioner of public works subject to the direction and control of the city council, giving him power to supervise the construction and repair of bridges, but not to contract therefor, and providing that whenever the city council shall so provide by resolution or ordinance, before any contract shall be awarded it shall be submitted to them for approval, an award by the commissioner of a bridge contract upon competitive bids is without force, where the city council by ordinance thereafter, without taking any

[1]Reported in 112 Pac. 250.

notice of the commissioner's action, awarded the contract to another bidder; and where § 163 of the charter providing for the awarding of contracts by the commissioner refers only to street work on local assessments and does not apply to bridges built at the expense of the general fund.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 18, 1910, in favor of the defendants, dismissing an action to enjoin the execution and awarding of a contract for a public improvement. Affirmed.

Roberts, Battle, Hulbert & Tennant, and *C. J. France*, for appellant.

T. L. Stiles, F. R. Baker, and *Frank M. Carnahan*, for respondents.

CROW, J.—On January 20, 1908, the council of the city of Tacoma, by resolution, directed the commissioner of public works to have preliminary plans, specifications, and estimates prepared for the construction of certain bridges. Being prepared, they showed an estimated cost of $300,000. On March 24, 1909, an ordinance was passed, in pursuance of which a special election was held, authorizing the issuance and sale of $300,000 of bonds to construct the proposed bridges. On January 10, 1910, the commissioner of public works advertised for bids. On February 14, 1910, he received nine sealed bids for one of the bridges, one bid from the Western Bridge Company for $44,100, and one from the plaintiff, C. F. Graff, for $47,495, all others being for larger sums. After consultation with the city attorney, the commissioner concluded the Western Bridge Company bid was defective; that plaintiff had made the lowest regular bid, approved the latter, and endorsed an acceptance thereon. His clerk noted an award to plaintiff on his office record, and posted a five-days' notice thereof. No further action was taken by the commissioner, nor was any contract executed with the plaintiff. Thereafter, and on March 2, 1910, the city council passed an ordinance whereby it declared the bid

of the Western Bridge Company to be the lowest, accepted the same, awarded a contract thereon, and directed the commissioner of public works to execute the same. Thereupon the plaintiff commenced this action to enjoin the city, its mayor, councilmen, and commissioner of public works from contracting with the Western Bridge Company, and to compel the execution of a contract with him. From a final judgment dismissing the action, the plaintiff has appealed.

The respondents have moved to dismiss the appeal because the controversy has ceased. In support of their motion they have shown that, since the entry of final judgment, the city has contracted with the Western Bridge Company, and that the bridge has been substantially constructed. On the authority of *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, this motion must be denied. We there said:

"It is true that when, pending an appeal from the judgment of the lower court, and without any fault on the part of the respondent, an event occurs which renders it impossible to enter a judgment in favor of the appellant which will give any effectual relief, the court will not proceed to a formal judgment but will dismiss the appeal; and it is held, also, that the same result will follow if the intervening event is owing to some voluntary act of the appellant. But no such result follows merely because the respondent has changed the status of the subject-matter in litigation. So in this case, if it appears that the contract entered into was subject to be enjoined because in violation of the statutes, the court may now inquire into the subsequent acts of the respondents and compel them to undo what they have wrongfully done, in so far as it is capable of undoing, and to answer in damages for anything that cannot be undone."

Appellant contends that, after his bid had been approved and an award had been made thereon by the commissioner of public works, he was entitled to his contract. Section 129 of the city charter provides that:

"Subject to the direction and control of the city council and the law and ordinances of the city, the commissioner shall have charge of and superintend all public works of the city,

and shall make such purchases of materials and supplies as may be authorized by ordinance or the city council; but he shall make no purchase of material or supplies of an amount or value in excess of five hundred dollars, except upon a written contract and after advertising for bids for furnishing such materials or supplies in the manner provided in sections 160, 161, and 162 of this charter."

Section 130 provides:

"He shall have special charge and control, subject to such ordinances as the city council may adopt, . . . of streets . . . roads, bridges, etc. . . . and of the improvement and repair thereof . . . and of all public works and improvements that may hereafter be made by the city . . ."

Section 163, in part provides as follows:

"The commissioner of public works shall compare the bids with the record made by the clerk, and shall thereupon at said time, or at such other time, not exceeding ten days thereafter . . . award the contract to the lowest bidder, except as otherwise herein provided. Notice of such award shall forthwith be posted for five days by the clerk of the commissioner of public works in some conspicuous place in his office. He may reject any and all bids, and must reject the bid of any party who has been delinquent or unfaithful in any former contracts with the city, and all bids other than the lowest regular bid, and on accepting said lowest bid shall thereupon return to the proper parties the checks corresponding to the bids so rejected. If all the bids are rejected . . . he shall return all the checks to the proper parties and again invite sealed proposals, as in the first instance."

Appellant contends that, under these sections, the commissioner of public works had authority to award the contract to him; that the commissioner did so, and that he is now entitled to the benefits of his bid, award, and contract. It will be observed from a reading of §§ 129 and 130, *supra*, that the commissioner in the performance of his duties acts at all times subject to the direction and control of the council. These particular sections do not authorize him to contract for the construction of bridges, and thereby bind the city.

They confer upon him the power to supervise their construction and repair. To contract for the construction of a bridge he should first be authorized by the council. No such specially delegated authority as to the bridge here involved has been shown. He had only been authorized to prepare plans, specifications, and estimates, and advertise for bids. Section 163 above quoted, upon which appellant especially relies, is a part of article 12 of the charter relating only to street and kindred improvements which are to be made at the expense of benefited property specially assessed therefor. No such improvement is here involved. The cost of the bridge in question is to be paid from the proceeds of the sale of the bonds above mentioned, which bonds are an obligation of the entire city. We must in this action look to §§ 129 and 130, *supra*, for the authority of the commissioner of public works. We find that in the exercise of powers conferred by these sections, he is at all times subject to the direction and control of the council. There is no evidence that the council has at any time authorized the commissioner to enter into a contract, or to take any steps further than to prepare plans, specifications, and estimates, and advertise for bids. The latter part of § 129 consists of the following additional words:

"Whenever the city council shall so require by ordinance or resolution, before any contract shall be entered into upon any award under this charter, the same shall be submitted to the city council for its approval and shall not take effect until so approved."

The argument of the appellant is made upon the theory that all conditions precedent for awarding the contract to him had been fully performed by the commissioner, who he contends was vested with full authority. He insists that when the award had been made to him by the commissioner, the city council, if they desired to thereafter pass upon such award, could only do so by passing an ordinance or resolution directing the commissioner to submit the award and

contract to them for approval, but that no such resolution or ordinance was passed. Appellant concedes that, if such an ordinance or resolution had been passed, and the council had thereafter rejected the award made to him, he would not be entitled to any equitable relief. The latter portion of § 129, *supra*, discloses a manifest intention to vest the council with unlimited control over the actions of the commissioner in the matter of awarding contracts such as the one here involved. The only purpose of any resolution, directing him to submit proposed contracts to them, would be to obtain their final consideration. When that purpose had actually been accomplished, either by resolution or by the enactment of the ordinance of which appellant now complains, declaring the bridge company bid to be the lowest, and awarding it the contract, it would certainly be an idle and unnecessary proceeding to enact another resolution or ordinance requiring the commissioner to submit the bids and any proposed contract to them for further consideration. In view of the fact that the council, by the enactment of the ordinance, did take charge of the entire matter, and did determine the award to be made, and the contract to be executed, and in view of the further fact that the commissioner was at all times compelled to proceed under their supervision and control, we fail to see how the appellant is entitled to any relief in this action.

The judgment is affirmed.

Rudkin, C. J., Dunbar, Morris, and Chadwick, JJ., concur.

[No. 9075. Department Two. December 12, 1910.]

NATIONAL BANK OF COMMERCE OF SEATTLE, *Respondent*, v. PUGET SOUND BISCUIT COMPANY *et al.*, *Appellants*.[1]

CORPORATIONS—REPRESENTATION BY OFFICERS—CONTRACTS—NOTES—AUTHORITY TO EXECUTE—RATIFICATION. A corporation is liable upon its promissory notes executed without express authority of its trustees, where they were signed by the secretary (one of the trustees) with the knowledge and consent of the president, the only other trustee, this was the habitual method of transacting its business, and the notes were used to raise funds to finance the corporation and purchase machinery and equipment.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 18, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on promissory notes. Affirmed.

J. W. A. Nichols, for appellants.

Williamson & Williamson, *H. F. Norris*, *Kerr & McCord*, and *E. F. Freeman*, for respondent.

CROW, J.—Action by National Bank of Commerce against The Puget Sound Biscuit Company, a corporation, and its receiver, on six promissory notes, alleged to have been executed and delivered by the defendant corporation to Gawley Foundry & Machine Works, a corporation, and assigned to plaintiff. From a judgment in plaintiff's favor, the defendants have appealed.

The notes for $1,000 each are signed "Puget Sound Biscuit Company, by J. E. Davis, Sec'y." Appellants contend that no authority for their execution by Davis has been shown, and that the corporation business was conducted by two trustees who did not direct the execution and delivery of the notes. The trial court found that on July 24, 1909, the defendant corporation executed the notes, which maturing at different

[1]Reported in 112 Pac. 265.

dates from September 24, 1909, to July 24, 1910, were payable to the order of Gawley Foundry & Machine Works; that on July 29, 1909, the payee, for a valuable consideration, endorsed and delivered them to respondent; that F. Charles Maurmann was president, J. E. Davis was secretary, and F. Charles Maurmann and J. E. Davis were trustees of The Puget Sound Biscuit Company; that J. E. Davis signed the notes with authority of F. Charles Maurmann and himself, the sole trustees; that within a day thereafter the trustees ratified the action of Davis; that respondent had no notice or knowledge of any want of authority in the secretary, or any alleged invalidity of the notes; that Joseph Gawley was an authorized manager of The Puget Sound Biscuit Company, and that the notes were delivered to him to be negotiated.

Appellants contend these findings are not supported by the evidence, but we hold they are, and that they must be approved. Although the business of the appellant corporation was generally conducted in an irregular and informal manner, without keeping complete records, and only one or two meetings of the board were held, it appears from the evidence that Davis as secretary executed these notes with the knowledge and consent of F. Charles Maurmann, the president, and only other trustee, for the express purpose of raising funds with which to finance the corporation, purchase machinery, complete its equipment, and enable it to transact its contemplated business. The respondent does not contend that Davis was necessarily authorized to execute the notes by reason of the simple fact that he was secretary, but does contend that, being secretary, he could be, and in fact was, vested with the ministerial duty of signing the name of the corporation to the notes, which thereupon became valid evidence of its indebtedness. Although it must be conceded that no meeting of the trustees was held, that no formal resolution was adopted requiring Davis as secretary to execute the notes, and that a

corporation usually acts by resolution of its trustees adopted as a board in regular or special session, and not through the trustees acting individually and separately, it has nevertheless been held that, when trustees habitually adopt the practice of giving their separate approval to the acts of agents of their corporation, as appellants' trustees did, such conduct will have the same effect as though evidenced by their formal action at a regular or special meeting.

In *Winer v. Bank of Blytheville*, 89 Ark. 435, 117 S. W. 232, 131 Am. St. 102, the court said:

"It is contended by appellants that there were no minutes or written evidence of the proceedings of the board of directors of the corporation authorizing the transfer of these notes, and that any other testimony as to that was incompetent. But a corporation, its board of directors, and shareholders may waive any necessity of a meeting of its board of directors for the transaction of the business of the company. 'They can do so by permitting the directors to establish a habit or usage of assenting separately to the making and performance of contracts by their agents. By permitting such usages or habits to be formed by a long course of business, they adopt and become bound by them, so long as they acquiesce. If this were not so, great injustice might be done to parties contracting with them in their usual way.' "

This court, applying the same rule in *Anderson v. Wallace Lumber & Mfg. Co.*, 30 Wash. 147, 70 Pac. 247, said:

"The authority of defendant's officers to make the agreement is challenged by defendant chiefly upon the ground that the trustees did not act as an official board, but as individuals only. It appears there were four trustees. Each had knowledge of, and three of them actively participated in, the transaction—the president, vice-president and superintendent, and the secretary. The principle stated in *Carrigan v. Port Crescent Improvement Co.*, 6 Wash. 590, 30 Pac. 148, is applicable here, and is approved, that is, when a corporation allows certain officers to manage its business, particularly, as here, such as president, vice-president, and superintendent, it must be responsible for their acts unless it affirmatively shows they were unauthorized."

This rule is applicable when corporation officers and trustees have indulged in an habitual method of transacting business, individually, separately, by common consent, and without formal action of the board as such. The appellant corporation was regularly organized. Its stock was fully subscribed. It installed a large manufacturing plant with machinery of great value. It manufactured and sold its product, transacting its business for several months. It had at different times two separate managers, who acted for it, directed its affairs, and had knowledge of the execution and negotiation of these notes. It finally became insolvent and passed into the hands of a receiver. After its first organization, no meeting of its board of trustees was held for the transaction of business or to take formal action in regard to any of its affairs. The evidence, although conflicting, is sufficient to sustain the findings of the trial judge. Under the facts shown, the appellants are in no position to now question the authority of the secretary to execute these notes.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MORRIS, and CHADWICK, JJ., concur.

[No. 8599. *En Banc.* December 12, 1910.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v. SLADE LUMBER COMPANY, *Respondent*.[1]

EMINENT DOMAIN—PRIVATE PROPERTY — TIDE LANDS — DAMAGE — NAVIGABLE WATERS—BRIDGES. Uplands and the abutting tide lands to deep water, purchased from the state, there being no intervening harbor area, is private property which cannot be taken or damaged without compensation by the operation of a railroad draw bridge across navigable water authorized by Federal and state authority; and the obstruction of a wharf on such premises by the operation of the draw is not damage *absque injuria*, and may be enjoined (RUDKIN, C. J., and GOSE, J., dissenting).

[1]Reported in 112 Pac. 240.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered September 18, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for an injunction. Affirmed.

George T. Reid, J. W. Quick, and *John C. Hogan*, for appellant.

Bridges & Bruener, for respondent.

Crow, J.—This action was commenced by the Northern Pacific Railway Company against S. E. Slade Lumber Company, to enjoin the defendant from interfering with the opening and closing of a drawbridge. From an order of dismissal, the plaintiff has appealed.

The material facts are undisputed. The Wishkah river, tributary to Grays Harbor and subject to tidal flow, is navigable for sea-going vessels to and above the city of Aberdeen. The appellant corporation, a common carrier, engaged in interstate commerce, owns and operates a line of railroad extending from Grays Harbor to Centralia and Tacoma, where it makes connections extending through Washington and other states. Shortly after October, 1897, under a permit from the secretary of war, appellant constructed a drawbridge across the river in the city of Aberdeen, and maintained and used the same until January, 1908. On April 20, 1907, the secretary of war issued to appellant a permit for the erection of a permanent steel bridge, and permission to place a temporary wooden bridge on the stream for use during its construction, which was commenced in January, 1908. The swinging arms of the temporary bridge and the new steel bridge are each thirty-one feet and ten inches longer than the arm of the old bridge. Respondent lumber company owns certain upland, and tract 13 of Aberdeen tide land immediately in front thereof, on the bank of the river. Its tide land extends from its upland to the deep waterway, and both tracts lie immediately north of appellant's railroad.

Respondent and its predecessors were owners of the upland for many years prior to July 10, 1907, when it procured from the state title to the tide land by exercising its preference right to purchase immediately after a plat of the Aberdeen tide lands had been filed in the office of the state land commissioner. On the east side of the river immediately north of and contiguous to appellant's railroad, respondent built a wharf, partly upon its upland and partly upon its tide land. The outer or west line of this wharf is identical with the inner or east line of deep water, there being no established harbor area. For many years respondent has owned and operated a sawmill on its upland, and has used its wharf for loading and unloading sea-going vessels. By reason of the length of the arms of the temporary wooden bridge and the steel bridge, appellant could not open or close the same while a vessel was lying in the stream alongside of respondent's wharf, immediately north of and contiguous to the railroad, although the shorter arm of the old bridge could always be opened and closed at such times. Prior to the commencement of this action, the respondent frequently placed and permitted vessels to remain, for loading and unloading at its wharf, immediately north of appellant's right of way, thereby preventing appellant's opening and closing its bridge and moving its trains. Appellant thereupon commenced this action to restrain the respondent from thus interfering with its bridge and trains. A temporary restraining order was granted, and the steel bridge was completed. On final trial a permanent injunction was denied, the action was dismissed, but the trial court permitted the appellant to file a supersedeas bond and continue the temporary restraining order during the pendency of this appeal.

The sole question before us is whether the appellant, having constructed its bridge under the authority of Rem. & Bal. Code, § 8670, and the permit of the secretary of war, is entitled to interfere with respondent's use of its wharf, without compensating it for resulting damages. Appellant,

citing *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *Board of Harbor Line Com'rs. v. State ex rel. Yesler*, 2 Wash. 530, 27 Pac. 550; *Muir v. Johnson*, 49 Wash. 66, 94 Pac. 899; *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278; *Grays Harbor Boom Co. v. Lowndale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267; *Lowndale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833, and other cases from this court, contends that, if the state be the absolute owner and proprietor of the beds and shores of all its navigable waters, subject only to the right of Congress to regulate interstate commerce, no owner of any bordering land can have a right of access to deep water; that the respondent having no such right is not entitled to recover damages for appellant's obstruction of the stream, under the authority of the state and the war department, and that any such impairment of respondent's access to its wharf over the stream is *damnum absque injuria.*

Under the conceded facts, we think this contention cannot be sustained. Respondent owns and holds not only the absolute fee simple title to the upland, but also a fee simple title to the tide land, formerly owned by the state, upon which the wharf is now constructed. The outer line of the tide land and wharf, its private property, is coincident with the inner line of the waterway, and there is no harbor area. Its wharf therefore abuts upon deep water, and is accessible to sea-going vessels. Although the state established and platted the tide lands, it refused to establish any harbor area. Having thus established and platted tide lands which extend to and border upon the waterway, it has sold to respondent every right it held in and to such lands, and now holds no right to any intervening harbor area. By virtue of the improvement and location of the tide land and respondent's ownership thereof, it (the respondent) has acquired a right of access to its wharf over the navigable waters, which interferes with no intervening right of the state. The cases cited by appellant are not pertinent. In the *Eisenbach* case, which the others

follow, it was held that an upland owner had no right of access to navigable waters, for the reason that the tide land or shore land lying between such upland and the deep water belonged to the state, that the recognition of any such right of access in the upland owner would impair the state's title and interfere with its absolute ownership over, and control of, its tide or shore lands. In this action respondent has acquired the tide land which extends to the deep waterway, and owns the same in fee simple. There is no intervening land or harbor area between it and deep water. In the absence of facts and conditions upon which the *Eisenbach* case was predicated, its doctrine ceases to be applicable, and on the facts now before us, respondent should be held to have a right of access to its wharf located on its own land and contiguous to the deep water, and that the same is a valuable property right. In *Muir v. Johnson, supra*, we said:

"As early as the case of *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632, this court held that the owner of uplands bordering on navigable waters as such had no riparian or littoral rights in such waters as would enable him to maintain an injunction from interference therewith. This holding was based on the ground that between the boundary of the upland and the navigable waters proper there were shore lands which belonged to the state and to which all riparian and littoral rights attached, and the state, or its grantee after it conveyed the lands, had the sole right to complain of obstructions placed between the lands and the navigable waters of the river, lake or other body of water upon which they bordered."

If the grantee of the state has the right to complain of such obstructions, it is apparent that the respondent, being such a grantee, has the right to complain in this action. If appellant can, under permission granted by the secretary of war, so extend the arm of its bridge as to interfere, without compensation, with respondent's access to a portion of its wharf, there is no logical reason why it may not in like manner completely destroy all access to the wharf and insist that the

injuries resulting to the respondent are *damnum absque injuria*. It is our view that no case heretofore decided by this court contemplates or warrants any such holding. As no tide land, harbor area, or other property of the state intervenes or lies between the respondent's wharf and the deep waterway, we hold the respondent has a special property right of access to the wharf which cannot be taken, damaged, or destroyed without compensation.

The judgment is affirmed.

DUNBAR, PARKER, MOUNT, MORRIS, CHADWICK, and FULLERTON, JJ., concur.

RUDKIN, C. J. (dissenting)—The majority opinion holds that a drawbridge, constructed over a public navigable stream of the state and of the United States, by authority of both the state and the United States, cannot be operated or maintained without the consent of the owner of private property abutting on the stream. This is contrary to my conception of the law, and I find nothing in the majority opinion to change my views or convince me of my error. I have always supposed that a sovereign state had absolute control and dominion over the public navigable waters within its borders, and that the individual, as against the sovereign, had neither property nor property rights therein. Such was the conclusion of the supreme judicial court of Maine in *Frost v. Washington County R. Co.*, 96 Maine 76, 51 Atl. 806, 59 L. R. A. 68, after a full review of the authorities, and in that conclusion I fully concur. The court there said:

"The plaintiff further contends that even if the trestle in its present condition is a lawful structure, and is lawfully maintained by the defendant company, he has nevertheless suffered much pecuniary loss from the action of the defendant company in building and maintaining it, and should be reimbursed therefor by the company. He concedes that the company has not taken, nor even touched, any of his tangible property, real or personal. The trestle is three-fourths of a mile distant from the property described in this suit. But the

closing of the channel by the trestle has undoubtedly reduced the earning powers and selling value of his property on the cove, and has lessened the profits of the business he was carrying on there. He claims he has a cause of action against the railroad company for the injury thus done to his property and business.

"This claim cannot be sustained. The only right of the plaintiff interfered with by the defendant company was his right of navigation by water in and out of the cove through the channel. This right of the plaintiff, however, was not his private property, nor even his private right. It could not be bought, sold, leased, or inherited. He did not earn it, create it, or acquire it. He did not own it against the sovereign. The right was the right of the public, the title and control being in the sovereign in trust for the public and for the benefit of the general public, and not for any particular individual. The plaintiff only shared in the public right. He had no right against the public. The sovereign had the absolute control of it, and could regulate, enlarge, limit, or even destroy it, as he might deem best for the whole public; and this without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby. The sovereign cannot take private property for public uses without providing for just compensation to its owner, but this constitutional provision does not limit the power of the sovereign over public rights. If, in the evolution of life and commerce, the sovereign comes to believe that the public good will be increased by the creation of some new or additional means of communication and commerce at the expense, or even sacrifice, of some older one enjoyed merely as a public right, the sovereign can so ordain even to the detriment of individuals. If, in the judgment of the sovereign, a railroad across a navigable channel of water and completely obstructing its navigation is of more benefit to the public than the navigation of the channel, he has the unrestricted power to thus close the channel to navigation, without making compensation to those who had been wont to use it. Every individual making use of a merely public privilege must bear in mind that he may be lawfully deprived of that privilege whenever the sovereign deems it necessary for the public good, and he must order his business accordingly. Unless the person authorized by statute to obstruct or close a navigable channel is required by the statute to make compen-

sation to persons injured by such action, he is under no legal obligation to do so. In such case the inconvenience and loss, however great, are *damnum absque injuria*. The company has damaged the plaintiff, but it has not wronged him. The defendant company has not interfered with the private property nor private rights of the plaintiff. It has lawfully, by express authority from the sovereign, merely abridged the use of a public right which was within the exclusive control of the sovereign. For this lawful act it is not obliged to make any compensation to the plaintiff, any more than to all other persons who might have occasion, however seldom, to navigate the channel.

"The authorities which support the foregoing statement of the law are numerous and uncontradicted. We cite a few only: *Spring v. Russell*, 7 Maine 273; *Rogers v. K. & P. R. Co.*, 35 Maine 319; *Gowen v. Pen. R. R. Co.*, 44 Maine 140; *Brooks v. Cedar Brook, etc.*, 82 Maine 17, 19 Atl. 87, 17 Am. St. 459, 7 L. R. A. 460; *Miller v. Mayor of New York*, 109 U. S. 385; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *Hamilton v. Vicksburg R. R. Co.*, 119 U. S. 280; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Cardwell v. Am. Bridge Co.*, 113 U. S. 205; *Scranton v. Wheeler*, 179 U. S. 141.

"It follows that the plaintiff has no legal claim to compensation, and cannot sustain the action. We regret that the plaintiff has been damaged by this new railroad being lawfully built across the channel he was wont to use, but he is only one of many thousands who are being individually damaged every day by the frequent lawful changes in the means and methods of manufacture and commerce, and yet cannot be said to be wronged by illegal acts."

The judgment of the court below should be reversed, with directions to grant a permanent injunction as prayed.

GOSE, J.—I concur in the view expressed by the chief justice.

[No. 8883. Department Two. December 13, 1910.]

JOHN B. CAMERON, *Respondent*, v. E. C. BURKE *et al.*, *Appellants*.[1]

BOUNDARIES—PLATS—GRANTS—DETERMINATION OF LINES. Where a plat fails to give the east line of certain platted lots, or the dimensions of the side lines, the intention of the plattors is to be given effect by applying the map scale to the side lines, ascertaining the length of the three sides given, and determining therefrom the other missing line.

DEDICATION—INTENT—PLATS — BOUNDARIES. A plat bordering on water is not to be construed as intended to cover only uplands, where it is evident that the plattors assumed to own and platted part of the shore lands.

COVENANTS—QUIET ENJOYMENT—DAMAGES—MEASURE. Where lots in a plat included shore lands, which were afterwards included in the state plat of the shore lands, the measure of damages for breach of covenant of quiet enjoyment in the deed of the lots is the proportion of the purchase price paid to the state which the area overlapped by the state plat bore to the total area of the lots.

APPEAL — RECORD — FINDINGS — REVIEW. Upon a question as to breach of covenant in a deed of certain lots, the contention that part of the lots are claimed by a city as a street cannot be considered on appeal, in the absence of the evidence on the subject, or any finding thereon by the trial judge.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 10, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for breach of covenant. Reversed.

Robert F. Booth, Farrell, Kane & Stratton, and *Reynolds, Ballinger & Hutson*, for appellants.

John B. Denny, H. A. Martin, and *A. A. Booth*, for respondent.

MORRIS, J.—Respondent brought this action to recover for breach of a covenant of quiet enjoyment, contained in a

[1]Reported in 112 Pac. 252.

deed from appellants to himself. The property described in the deed is "lots 1, 2, and 3 in block 18, B. F. Day's Eldorado addition to the city of Seattle." After the delivery of the deed, and the enjoyment of possession thereunder by respondent, the state, through its board of state land commissioners, platted Lake Union shore lands, lots 1, 2 and 3, block 96, of which plat overlaps a portion of the area claimed by respondent under his deed from appellants, which gave respondent the option of purchasing from the state or suffering an eviction. The portion of lots 1, 2 and 3, block 18, Eldorado addition, not affected by the plat of Lake Union shore lands, was an irregularly shaped tract whose north line would be 94 feet, the east line 158 feet (approximately), the south line 60 feet, and the original frontage on the west line of 186 feet. The portion covered by the plat of Lake Union shore lands depends upon the construction to be given the east or water line of lots 1, 2 and 3, in Eldorado addition. The chief value of the lots in this block of Eldorado addition is their water frontage on the lake, and respondent, for the purpose of preserving this frontage, purchased lots 1, 2 and 3, in block 96, Lake Union shore lands, from the state, paying therefor $1,859.13. The court below, being of the opinion that the lots so purchased from the state were within the description called for by appellants' deed to respondent, and that such assertion of paramount title by the state was an eviction, awarded judgment accordingly in said sum, and appellants, alleging error in such judgment, appeal.

Lots 1, 2 and 3, block 96, Lake Union shore lands, cover an area irregular in shape and approximately 194 feet on the north line, 95 feet on the east, 195 feet on the south, and 158 feet on the west or base line; while the west or base line of lots 1, 2 and 3, block 18, Eldorado, is approximately 94 feet farther west on the north line and 60 feet farther west on the south line, with a west or base line of 186 feet. As originally platted, these lots in block 18 are all in the water, except a

triangular piece of upland about 40 feet in length on the north line of lot 1, and running thence southwesterly to the base line, including a small portion in the northwest corner of lot 2. The recorded plat of Eldorado addition shows these lots in block 18 as having north, south, and west lines only, the east line being somewhere out in the lake, the length of the north and south boundary lines not being given on the plat. The plat, however, says the "Dimensions of all lots, blocks, streets and drives are as shown on the plat," and the plat is drawn upon a given scale, so that by applying the scale, it is possible to ascertain the length of any given line. The lots in block 18 having then no east end lines, the question naturally presents itself, what area is described in these lots and what passed by the deed. This must first be ascertained before it can be determined from what portion of his grant respondent has been evicted.

The first rule to be observed in ascertaining the true construction of the grant to respondent, inasmuch as the description of the lots follows the description of the plat of Eldorado addition, is to ascertain the intention of the dedicator as expressed in the plat, and in doing so, to give effect to the entire plat. Following this rule and applying the scale to the northerly and southerly boundary lines of lots 1, 2 and 3, in block 18, as given on the plat, we find the length of the northerly line of lot 1 to be 127 feet, the length of the line common to lots 1 and 2 is 120 feet, the next line common to lots 2 and 3 is 112 feet, and the southerly boundary line of lot 3 is 114 feet. The fact that these lines are of irregular length is immaterial. It is the duty of the court to give effect to the plat, and if by using the description of the plat, we can give length to these lines, we should do so. The law will not disregard the lines so ascertained, because they may be of uneven length, as we cannot assume that in platting these lots it was the intention of the dedicator to give even lengths to all his side lines, although it may be difficult to imagine a good reason why it should not have been done. Having as-

certained the length of the side lines, it is possible to give the lots an easterly end line by connecting the side lines. This brings us within a well known rule of law in the construction of deeds. Where three sides of a grant are given and the fourth omitted, the missing line should be ascertained by connecting the outer termini of the adjoining lines with a straight line. *Laub v. Buckmiller*, 17 N. Y. 620; *Dygert v. Pletts*, 25 Wend. 402; *Woodward v. Nims*, 130 Mass. 70; *Johnson v. Williams*, 22 N. Y. Supp. 247.

Applying this rule, it is possible to sustain the deed, thus bringing us within an equally known rule, that a deed will be sustained when, from the entire description, it is possible to ascertain and identify the land intended to be conveyed. Devlin, Deeds, § 1012. Appellants, while admitting the above rule and suggesting the possibility of its application in this case, suggest that the deed is void for want of definiteness of description, and that it is impossible to ascertain the grantor's intention as to the eastern boundary of the lots, no length being given to the side lines, and the lots thus have no area. What we have said answers this contention.

It is next suggested that the area intended is such upland as might lie within the lines. The only upland within these lines is that small portion in lots 1 and 2; the whole of lot 3 and practically the whole of lot 2 lying in the water. Such description therefore would not be necessary if it was only intended to pass the upland, and it is evident additional area was intended. Next, that in the absence of a given length to the side lines, it is impossible to ascertain whether it was intended to claim to the center of the lake or to the outer harbor line. The outer harbor line had not been established at the time of the making of this plat, nor was there anything to indicate (it being prior to the adoption of our constitution) that a harbor line ever would be established in Lake Union at the time of the dedication of this plat, June 22, 1889. It is therefore evident, as we held in construing this same plat in *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988, and *Shorett*

v. Signor, 58 Wash. 89, 107 Pac. 1033, that, while the Days, the dedicators of this plat of Eldorado addition, did not own all the land they platted, they filed the plat and laid out the lots under the assumption that they owned the shore lands, and by virtue of their ownership of the uplands bordering on the lake, had and could convey title to the water lots. They did claim an area covered by the water lots, and as it is possible from the plat to ascertain what that claimed area was, and to thus give effect to the missing end lines, it is the duty of the court to do so.

Having established the area covered by respondent's deed, the next inquiry is, to what extent has he been evicted by the assertion of paramount title in the state. Taking the northerly line of lot 1 of block 18 as we have established it as indicated on the plat, to be 127 feet, and the southerly line of lot 3 to be 114 feet, and referring again to that portion of the area of these lots not covered by the plat of block 96, a tract 94 feet on the northerly side and 60 feet on its southerly side, we have remaining an area 33 feet on its northerly side, 54 feet on its southerly side, having the west or base line of block 96, a line approximately 158 feet in length, for its westerly boundary, and the established missing line approximately 146 feet in length as its eastern boundary; all of which area is included within block 96, and represents that portion of block 96 which overlaps, or is overlapped by, lots 1, 2 and 3, block 18, as we have established them. This is the area, according to our holding, from which respondent has been evicted by the state. The amount paid by respondent to the state for all of lots 1, 2 and 3, block 96, was $1,859.13, and the measure of his damage for such eviction is that amount the ratio of which is to the amount paid by him as the area from which he was evicted is to the whole area of lots 1, 2 and 3, block 96, which is the sum of $376.87, which amount we hold represents the true measure of respondent's damage. *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 31 Wash. 610, 72 Pac. 455.

The respondent sets forth in his complaint that "the city of Seattle, relying upon the plat of the shore lands and upon the dedication of said premises by the state of Washington as a shore land street, is now proceeding to use the same premises as a public street." And the statement of facts shows the admission of a summons and complaint in what is referred to as the "Westlake Avenue Boulevard condemnation suit," marked plaintiff's Exhibit B. There is, however, no such exhibit in the record here. Nor did the court make any finding in this regard. We are, therefore, unable to determine what portion of the area in question here is sought by the city for a street, or what effect, if any, such a street would have on that portion of block 18 not included in block 96, or that portion included in the overlapping of the two blocks. We are therefore unable to determine what effect, if any, such condemnation proceedings have on the questions submitted by this record.

The judgment of the court below is reversed, and the cause remanded with instructions to enter a judgment for the plaintiff in the sum of $376.87, with interest from the time of respondent's payment to the state, which time we are from the record unable to ascertain.

Rudkin, C. J., Chadwick, Dunbar, and Crow, JJ., concur.

[No. 8941. Department Two. December 13, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. HARRY DONOVAN, *Appellant*.[1]

INTOXICATING LIQUORS—LOCAL OPTION — CONSTITUTIONALITY. The local option law of this state is constitutional.

SAME—INCORPORATION OF TOWN IN DRY TERRITORY—STATUTES—CONSTRUCTION. Under the local option law making a separate unit or district of all that portion of a county outside of incorporated cities and towns, and which failed to contemplate the situation where a new town is subsequently incorporated within the prohibition district, such newly incorporated town may license the sale of intoxicating liquors within the municipality, as it might have done if previously incorporated, and without first submitting the matter to a vote (MORRIS, J., dissenting).

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered May 3, 1910, upon a trial and conviction of maintaining a public nuisance. Reversed.

M. P. Hurd, for appellant.

Augustus Brawley, for respondent.

DUNBAR, J.—An information was filed against the appellant by the prosecuting attorney of Skagit county, charging him with unlawfully keeping and maintaining a certain building in the town of McMurray, in which he kept, received, and harbored intoxicating liquors for the purpose of selling, giving away, and distributing the same, contrary to the statute, etc. Based on this information, a search warrant was issued, and the sheriff took possession of appellant's building and saloon property. Upon the trial of the cause, the appellant was convicted as charged. From a judgment of conviction, this appeal is taken.

The agreed statement of facts shows that Skagit county, in which the town of McMurray is situated, is a duly organ-

[1]Reported in 112 Pac. 260.

ized county and political subdivision of the state of Washington; that a petition was duly and regularly filed with the proper officer of said county for the purpose of ascertaining whether or not intoxicating liquors should be licensed to be sold in that unit consisting of all that part and portion of said county outside of the incorporated cities and towns therein. The election resulted in a large majority in favor of the prohibition of the sale of liquor in such district. Afterwards the town of McMurray, having the requisite population, was incorporated within the boundaries of the territory which had voted to prohibit the sale of intoxicating liquors. The city officers were duly elected, and the council duly passed an ordinance regulating the manner and place of the sale of spirituous, vinous, fermented, and malt liquors in the town of McMurray, imposing and fixing licenses, etc. Defendant, the appellant here, was granted a license to sell. This is a sufficient statement to indicate the nature of the case.

There are certain queries which are pertinent in this case: Was the result of that vote to fix the status of the territory voting, for one year—was that the aim and object of the legislature, or was the policy of the legislature to fix the status for the whole territory until a part of the territory was removed from its operation by a change in its form of local government; or did the legislature fail to contemplate such a situation as developed here, and therefore made no provision to govern it. We are inclined to adopt the last view, and that deprives us of the benefit of one of the commonest tests of statutory construction, so that we will be compelled to examine not only the local option law, but the general statutes, to determine the rights contested in this case.

The first contention of appellant is that the local option law is unconstitutional. But this character of laws has been sustained in so many jurisdictions that we do not feel called upon to enter upon a discussion of that question. The principle has also been sustained by this court in *State v. Storey*, 51 Wash. 630, 99 Pac. 878; *Gunther v. Huneke*, 58 Wash.

494, 108 Pac. 1078, and *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179.

The further contention is made that, after the town of McMurray was incorporated, it was relieved from the operation of the local option law and was clothed with the rights that other towns of its class, viz., cities of the fourth class, were clothed with, in relation to the licensing of the sale of intoxicating liquors. It is conceded that, in towns of this class outside of the operation of the local option law, the city authorities have power to license and regulate the sale of liquors. This contention, we think, must be sustained. The learned prosecuting attorney contends that the town of McMurray can only be relieved from the operation of the law which theretofore controlled its territory by holding an election; that otherwise the law as voted upon in the territory in which it then existed must control; and he cites many cases to sustain this contention. The first authority cited is 23 Cyc. 95, which is to the effect that:

"Where a local option law is in force in an entire district, and a portion of the district is cut off and joined to other territory under a new name, the law still remains operative through the part not thus severed. And also, where a new district is carved out of one where prohibition is in force, the same law will continue in force in the new district."

To sustain this announcement, the author cites many cases, most of which are cited by the respondent in this case, and undoubtedly sustain the text. In *Higgins v. State*, 64 Md. 419, 1 Atl. 876, it was decided that where by act of assembly submitting the question to the voters of the several election districts of Carolina county, whether or not spirituous or fermented liquors should be sold therein, a majority of the votes in the third election district of the county was cast against the sale of spirituous or fermented liquor therein, and by a subsequent act of assembly a new election district was established out of the third election district, the prohibition will continue to apply to the inhabitants of the new

district, there being nothing in the latter act at all inconsistent with the provisions of the former act. The other cases cited are of this kind. But the principle involved there is not the principle that is involved in this case at all. There it was the question of changing boundaries alone which was considered, and those cases are undoubtedly rightly decided. As the court in *Higgins v. State*, *supra*, well said:

"All the qualified voters, therefore, of that part of election district No. 3, now forming election district No. 6, had a right and were called upon to vote at the election in May, 1876, for or against the adoption of the prohibitory law, and the result of that election subjected the entire population of district No. 3, as then constituted, to the provisions of the act, and the subsequent division of the district has not had the effect of restricting the operation of the act to only a part of the original territory in which it applied and for which it was adopted. The mere change of name or number, as applied to part of the district, certainly should have no such effect, and that is really all that has been done in this case."

While a cursory, superficial view of this language might lead to the conclusion that it bore upon the case under discussion here, it will be seen that another principle altogether is involved here, which has no reference to the change of boundaries; but it does have reference to the establishment of another form of government within the territory which had previously been brought under the operation of the law. There was a limited sovereignty formed within this territory by the incorporation of this city. It is one of the aids of the state, clothed to a certain extent with the powers of the state. The law prescribes these powers for cities of the fourth class, and it will not be presumed that it intended to make any distinction in powers between cities of the same class.

It is conceded by the respondent that the town would have a right to relieve itself of the prohibition within the time which the prohibition lasts, but that it must be done

by an election. It would have a right to hold an election only by reason of the fact that it had become an incorporated town. By reason of that same fact, it would have a right to exercise any right which was accorded to an incorporated town of its class. In other words, it is not by reason of any change of territory that it is given this right, but by reason of the authority which the general law gives to an incorporated town. We think, therefore, that the town of McMurray is clothed with the same powers that other towns of its class are clothed with, and that it did not violate any provision of the law when it assumed to regulate the sale and traffic of intoxicating liquors.

The judgment will therefore be reversed.

RUDKIN, C. J., CHADWICK, and CROW, JJ., concur.

MORRIS, J., dissents.

[No. 8860. Department Two. December 14, 1910.]

BERNARD STARCK, *Respondent*, v. WASHINGTON UNION COAL COMPANY, *Appellant*.[1]

MASTER AND SERVANT—SAFE PLACE—COAL MINE—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE. An experienced coal miner, part of whose duty it was to put props under the overhanging coal, has a right to rely on the assurance of the foreman, made after examination in the miner's presence, that the place was safe, and does not assume the risk and is not guilty of contributory negligence in so doing.

SAME. Merely working in a dangerous place, the risk of which is not assumed by the servant, is not contributory negligence.

SAME—NEGLIGENCE—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether sufficient props were furnished a miner in a coal mine, it is proper to exclude evidence as to trouble in compelling other miners to put up props.

MASTER AND SERVANT—ACTIONS—PRECEDENT CLAIM—MATERIALITY—TRIAL—OBJECTION. In an action for injuries sustained in a coal

[1]Reported in 112 Pac. 235.

mine, it is not material that no claim was made by plaintiff before suit commenced, during some four months after the accident, there being no attempt to show the purpose of such evidence, claimed on appeal to be relevant as showing false testimony by the plaintiff at the coroner's inquest.

MASTER AND SERVANT — NEGLIGENCE — COAL MINE — INSTRUCTIONS. The use of the words "any negligence," in an instruction relating to negligence in furnishing props in a coal mine, is not to be construed as relating to any other negligence not mentioned in the pleadings, where from the context the jury could not have been misled.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $20,000 for personal injuries sustained by a coal miner, thirty-seven years of age, is not excessive, where he had a wife and five children to support, and according to the expert witnesses he was left a broken and disjointed wreck, with no hope of recovery and only suffering and embarrassments to look forward to.

Appeal from a judgment of the superior court for Clarke county, McMaster, J., entered January 26, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through the caving in of coal in a mine. Affirmed.

W. W. Cotton, Arthur C. Spencer, James P. Stapleton, and *Ralph E. Moody,* for appellant.

Owens & Finck, A. L. Miller, and *Reynolds, Ballinger & Hutson,* for respondent.

DUNBAR, J.—The appellant owns and operates a coal mine in Thurston county, in this state, and the respondent was employed to work in such mine. While working, he was injured, and brought this action against the appellant to recover damages for such injury in the sum of $25,475. The complaint alleges, among other things, that on the 5th day of May, 1909, respondent was working in a room or tunnel in said mine by excavating coal, earth and stone in the progress of the mining operations of appellant; that in said room there were three layers or ledges of coal, the top of the uppermost of which three ledges ran to the roof of said room; that in the mining of the coal it was the custom to drill between

said veins or ledges of coal for a distance of approximately six feet and place explosives therein, which explosives were fired at night, at the conclusion of the work in said room, for the purpose of throwing down and dislodging the coal and materials between the same, and upon resuming work the following day the miners loaded the coal and material into cars in said room to be taken to the surface of the mine; that occasionally the explosives would not break loose all of the upper ledge of the coal, and a portion thereof, not exceeding six feet in length, would be left adhering to the roof of said room; that respondent was accustomed to prop up, not merely the roof of the room, but also such coal in the upper seam or ledge which might adhere to the roof; that unless the roof and the coal adhering thereto were properly timbered or shored up or otherwise supported, the coal and the roof were apt to fall, and were very dangerous to miners working in the room mining the coal; that on and prior to May 3, 1909, the roof of said room, for a distance of approximately thirty feet from the working of said mine, was not propped up, or in any way timbered or shored so as to prevent the same from falling; that by reason of said fact there was danger that said roof and coal would fall; that on said date respondent complained to appellant's foreman that such roof was dangerous, and requested the foreman to furnish timber or props to be used in securing said roof and making it safe; whereupon appellant's foreman examined said roof, and pronounced the same safe, and assured respondent that the same was safe and would not fall upon him; that again, on or about the 3d day of May, 1909, respondent called the foreman's attention to the condition of said roof and that it was not propped up, and again requested the foreman to furnish him with timbers for props to secure said roof; that the foreman again assured respondent that the roof was safe, but promised to send props to said working place to be used in securing said roof; that respondent believed and relied upon said assurances of said foreman and upon his

promise to furnish timbers and props to secure said roof; that thereafter, and on the 5th day of May, 1909, there being coal from said upper seam or ledge adhering to the roof of said room, and the same requiring to be timbered or propped up, respondent again requested the foreman to furnish said props or timber; that the foreman again examined said roof and examined said coal and informed respondent, and respondent believed, that the roof and coal were not immediately dangerous; that the foreman thereupon promised to furnish props and timber to secure said roof and said coal, and respondent relied thereon, and in relying upon said assurances of the foreman, continued to work in the mine; that the foreman was the person in charge of that portion of the mine in which respondent was working, and was the proper agent of appellant to furnish props and timber for the use of said working place, and the proper person for respondent to apply to; that neither the foreman nor any other agent of appellant, nor appellant, furnished any timber for use as props whatever, to hold up or secure the roof or prevent it from falling, nor did appellant keep a sufficient supply, or any supply, at the mines so that the workmen therein might be able to properly secure the roof of said mine; that all these facts were, on the 5th day of May, 1909, and during all the time of their continuance, well known to appellant and his foreman, but that respondent relied upon said assurance of the foreman that the said place of work was safe, and upon his promise to supply props to hold up said roof, and believing said assurance and promise, continued to work at said place until the happening of the accident.

The complaint further sets out the nature of the accident and the damages arising therefrom, the accident being caused by the caving in and falling upon respondent of the coal from the roof. The answer denied the failure of the appellant to furnish respondent with props as required by law; alleged that the respondent and his fellow servant, who was

killed at the time of the injury to the respondent, were on the day of the falling of said top coal and the injury complained of, warned by the foreman of the mine and by other workmen in the mine that it was unsafe for them to continue work under such overhanging coal, and that they should prop up the same; alleged negligence on the part of the respondent; that the dangers and risks of working under this coal at the place described in the complaint were open, obvious, and apparent and understood by respondent, and were voluntarily assumed as the risk and danger incident to his employment, and that it was the duty of the respondent to use the timbers furnished him by appellant in propping up and timbering the overhanging coal as the work progressed. The affirmative matter in the defense was denied by the reply and, upon these issues, the cause went to trial by a jury, and verdict in favor of the respondent for $20,000 resulted. The ordinary motions were made before verdict. After the return of the verdict, a motion for new trial was made and refused, judgment entered, and appeal followed.

The first assignment of error is that the amended complaint fails to state facts sufficient to constitute a cause of action against the appellant, because it shows upon its face that, whatever injury respondent suffered, was caused through his own want of care and prudence, and through his own negligence, and that he directly contributed thereto and was guilty of contributory negligence; that when the respondent stated that he was accustomed to prop up, not merely the roof of said room, but also such coal of the upper seam or ledge which might adhere to said roof, and that unless such roof and said coal adhering thereto were properly timbered or shored up or otherwise supported it created a dangerous condition, that condition and other statements of the complaint which we have set forth conclusively show that it was no surprise to the respondent that the coal adhering to the roof fell upon him, for he knew that it was likely to do just what it did, and expected that it would do so; that the mat-

ters and things stated in the complaint conclusively show contributory negligence on the part of the respondent as a matter of law. Appellant cites *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310, and *Narramore v. Cleveland, etc. R. Co.*, 96 Fed. 298, 48 L. R. A. 68, to sustain this contention.

It is contended by the appellant that the matters and things set forth in the complaint could be brought to the knowledge of the respondent only by observation of the roof, and that being true, the respondent was in a better position to observe them, working continuously in the room with the coal, than was the foreman; that if they were in such a dangerous situation, it must be brought to the attention of the foreman by such casual observation as one in his position would make in passing in and through said room, and that the danger would therefore be much more apparent to an experienced miner who was all the time in the room working at the coal.

There are two sufficient answers to this contention. The first is that it ignores the rule, which is well established in this court and in practically all the courts in the Union, that the servant has a right to rely upon representations of the master that the dangerous condition of which the servant notifies the master will be corrected. This doctrine proceeds upon the theory that the promise of the master to amend constitutes an implied contract on his part that he will be responsible for the safety of the servant so far as the safety of the place is concerned; or in other words, that he will assume the risk incident to working in the particular place. It is true the complaint says that the roof had become dangerous, and no doubt it was the belief of the respondent that the roof was dangerous. But upon reporting the danger to the foreman, this promise was made, with the assurance on the part of the foreman that the roof was safe. That assurance was made after an examination by the foreman in the presence of the respondent, and upon that assurance and promise respondent unquestionably had a right to rely. Nor should the ex-

amination made by the foreman under such circumstances have been a casual examination or observation. His duty was to inspect not casually but thoroughly, and it was upon the presumedly thorough inspection that the respondent had a right to rely.

Nor do we think that the allegations of this complaint bring it within the cases cited to sustain it. It is true that in *Green v. Western American Co.*, *supra*, which was the first case in this jurisdiction to lay down the rule that the master assumed the risk where the statutory requirements in regard to safe place and appliances had not been complied with, there were some expressions used by the court which might readily lead to the conclusion that the doctrine claimed for it by the appellant was true, viz., that while the plaintiff in an action for damages in a case brought under the statute for violation of, failure to guard, or make safe, would not be held to have assumed the risk, he would be held to have been guilty of contributory negligence for working in an unsafe place. But this doctrine certainly never was intended by the court to be carried so far as to hold that a plaintiff would be held guilty of contributory negligence for working in a place where he would not be held to have assumed the risk in working. No court would trifle with the rights of a litigant to such an extent as to hold that he could recover in a given case because he did not assume the risk of working in a certain place, and then hold that he could not recover because he was guilty of contributory negligence in working in that certain place. This would be allowing words and terms to control a principle. If the contention of the appellant were to be sustained, it would destroy the logic of the decision in *Green v. Western American Co.*, *supra*, for in that case the complaint was in principle identical with that in the case at bar. That was a coal mine case where the plaintiff had been injured by the falling of the coal, for the reason that the walls had not been propped, exactly as in the case at bar. In that case the complaint also showed, as in this, that it became

necessary to timber and prop the cross-cut where the plaintiff was working, so as to protect him from falling coal and rock, and that he requested the pit boss to furnish him with timbers to be used as props for the purpose of protecting himself; but that the pit boss, as in this case, requested the plaintiff to proceed to his working place, assuring him that the place was safe and did not need and require timbers, but that he would shortly furnish the plaintiff with timbers to prop; that by reason of such representation on the part of the pit boss, he went back to work; that by reason of the failure of the pit boss to furnish the props, the coal fell and he was injured. It would be difficult to distinguish the complaint in that case in principle from the complaint in the case at bar.

Narramore v. Cleveland etc. R. Co., *supra*, which is the case upon which the *Green* case to a large extent was founded, does not sustain appellant's contention. It is true that it was there said that many authorities hold that contributory negligence was a defense to an action arising from the violation of a statutory duty; and that was undoubtedly the proper view, citing cases to sustain that rule. There can be no question but that cases might arise where contributory negligence would be an element in the case available to the defendant, but the two propositions have no real relation to each other. One relates to the risks assumed by an employee in the entering into a given service, and the other to the vigilance to be exercised by the employee under certain circumstances; that is to say, that the servant may be guilty of contributory negligence in a case where the master has neglected or refused to perform a statutory duty, but the negligence has no relation to the place, but must be negligence in the doing of some independent act on the part of the servant, which is the proximate cause of his injury. It must be borne in mind, however, that it is this independent act of the servant, instead of the danger of the place or of the machinery, which causes the accident. This view has been sustained by this court in *Hall v. West & Slade Mill Co.*, 39 Wash. 447,

81 Pac. 915, which was the first case affirming the doctrine announced in the *Green* case. There it was said:

"But it will hardly do to say that an employee is guilty of contributory negligence for merely working in a dangerous place when he does not assume the risk of injury for working therein. It is true that in such cases contributory negligence and assumption of risk approximate, and it is difficult to draw a line between them, but we think that, to convict an employee of contributory negligence for working in a place where he does not assume the risk of injury, it must be shown that he did not use care reasonably commensurate with the risk to avoid injurious consequences; in other words, that it was some negligent act of his own that caused his injury, and not alone the dangers of his situation."

In *Doyle v. Great Northern R. Co.*, 43 Wash. 558, 86 Pac. 861, the court said:

"Having determined that respondent did not assume the risk as a matter of law, the question of contributory negligence based thereon is necessarily decided."

In *Johnson v. Far West Lumber Co.*, 47 Wash. 492, 92 Pac. 274, it was held that an employee who works about machinery after having notice that it is not guarded as required by the factory act, and the risk of which condition he does not assume, is not thereby guilty unless the injury is caused by a negligent act of his own and not alone by the danger of his situation. This must be the true and only distinction. We therefore conclude that the complaint was sufficient in this case to place the defendant upon trial.

There was no error upon the part of the court in sustaining objection to the question to witness Needham: "What do you know of your own knowledge as to the trouble, if any there was, had there with compelling the miners to put up props?" The controlling question in this case was whether the appellant had furnished the props as required. The fact that the appellant may have had trouble with other miners in this regard would in no way bind the respondent.

It is also earnestly contended that the court erred in sus-

taining objection to the following question to the witness Needham: "Did he or any one in his behalf ever present a claim to you or to the company for his injuries in this case prior to the filing of the complaint in this case?" The following objection was made by Mr. Ballinger, counsel for respondent: "We object on the ground of not material, not relevant, not responsive to any issue in this case whether Mr. Starck has presented any claim to the company prior to the bringing of the suit." The objection was sustained and exception noted. The contention of the appellant is that, inasmuch as the testimony was exceedingly conflicting, as it is claimed that at the coroner's inquest the respondent exonerated the appellant from any blame for the accident and stated that props had been furnished, and that if he had not presented a claim between the time of the accident and the bringing of the action, which we believe was some four months, these would be circumstances which the jury would have a right to consider tending to show that the respondent had sworn falsely upon the hearing of this cause. It might be possible that under some circumstances a question of this kind would throw light upon the case and the point in issue. But this question, if such was its purpose, was not brought to the attention of the court or the counsel for respondent. It evidently was the understanding of the court and of counsel for respondent that the objection was made simply upon the theory that it was not necessary as a matter of statutory requirement for this claim to have been presented, as it is required to be in damage cases against municipal corporations. Counsel for appellant was content to simply ask the question without enlightening the court as to its relevancy. On its face it was not relevant, and we think it would be doing a great injustice to reverse this case, because the question was properly objected to so far as its object was indicated.

Objection is made to many of the instructions given by the court and the refusal of the court to give instructions offered. Appellant sets forth many general principles of law governing

and controlling instructions, citing cases to sustain those principles; but from an examination of the instructions given and refused, we think such principles were respected by the court in this case. In considering the instructions given, and requested and refused, the appellant directs the court's attention to requested instruction No. 7, refused by the court, and to instruction No. 16, given by the court. Requested instruction No. 7 was as follows:

"I further charge you that the law requires the defendant to furnish sufficient timbers for props with which to safeguard the roofs above where the plaintiff is working, and if the defendant has failed to do that and the plaintiff has been put to an election whether he will go ahead and risk the danger or quit working, and he concludes to go ahead and work, it becomes a question as to whether in so doing he acted with due care or recklessly exposed himself to obvious and imminent danger. If while in the exercise of due care he is injured by reason of the fact that the company, after request, wilfully failed to furnish sufficient or suitable timbers with which to prop the roof, his injury is then due to a violation of the statute on the part of the company and they are responsible. On the other hand, if the danger is obvious and imminent and it is nothing but recklessness for the plaintiff to have exposed himself to it, then I charge you that the law will not permit the plaintiff to recover, for the injury in that event is due directly to his own lack of ordinary prudence."

It will be seen that the contention in this instruction was the same contention that was made by the appellant which we have discussed, in relation to the sufficiency of the complaint. However, instruction No. 16, given by the court, was as follows:

"You are instructed that one of the defenses set forth in the answer is that the dangers of the working place where plaintiff claims to have been injured were open and apparent to him and were known to him, and that by working in said place he assumed the risk thereof. I instruct you that if you find from the evidence that defendant performed its statutory duty, as hereinbefore defined to you in these instructions, and was not guilty of any negligence, and that there still remained

a peril and risk to the plaintiff at said working place, and that the same was open and apparent to plaintiff, or known to him, or that he had such notice thereof that a man of ordinary prudence under like circumstances would have discovered such danger, then plaintiff did assume the risk of such danger, and if he was thereby injured he has no redress; but if you find from the evidence that the danger to plaintiff at said working place, if any, was caused by the neglect of defendant to perform its said statutory duty, if it did fail to perform the statutory duty, and that it was by reason of such negligence that plaintiff was injured, if he was injured, then you are instructed that plaintiff did not assume the risk of injury through such neglect."

It seems to us that the appellant's rights were guarded in an exceedingly liberal manner in this instruction, and that the only objection that can be raised to it is the very technical objection as to the use of the word "any" in the early part of the instruction. It is contended by the appellant that there was no other negligence than the negligence of neglecting to perform its statutory duty in relation to the furnishing of props, and that under the instruction the court authorized the jury to consider the question as to whether appellant had been guilty of some other negligence, thereby authorizing the jury to take into consideration a fact that was not in the pleadings, and particularly not in the evidence; and that the instruction was therefore erroneous. But we think this is too narrow a construction to place upon this instruction. There was probably an unfortunate use of the word "any," but we think the jury well understood when the court said: "I instruct you if you find from the evidence that the defendant performed its statutory duty as hereinbefore defined to you in these instructions, and was not guilty of any negligence," that the court had reference not to any other negligence, but any negligence in not performing its statutory duty as thereinbefore defined. If judgment were reversed for every little mistake made in the use of language by courts while instructing juries, the wheels of justice would be effectually blocked.

The court further instructed the jury as follows, in No. 14 of the instructions, which is also objected to by the appellant:

"You are instructed that if you find that the defendant failed and neglected to keep a sufficient supply of timber at the mine where plaintiff was working, required for use as props so as to enable plaintiff to properly secure the said workings from caving in, and failed and neglected to send down into the mine such props as were required, and to deliver the same at the entrance of the working place, then you are instructed that plaintiff cannot be held to have assumed the risk of such danger, if any, as you may find there was, of injury to him from the caving in of his working place, for want of such props; nor can you under such circumstances ascribe to plaintiff contributory negligence solely by reason of the fact that he worked in said place, if he did so work, unless the peril of working there, if any, was so obvious or imminent that any man of ordinary prudence would not have worked there under like circumstances, but if you find that such danger was so obvious and imminent that no man of ordinary prudence would incur it, then I charge you that the law will not permit the plaintiff to recover."

This instruction surely went as far as any court has ever gone in protecting the interests of the defendant, and the court made the distinction which this court has made when it said: "nor can you under such circumstances ascribe to plaintiff contributory negligence simply by reason of the fact that he worked in said place, if he did so work."

Many other assignments of error are made in relation to the instructions, but they are principally based upon the reason alleged to support the assignment that the complaint did not state a cause of action. There was but one issue in this case, viz., the negligence charged that the appellant did not perform its statutory duty. The instructions squarely placed that question before the jury. Both the theory of the appellant and the theory of the respondent in relation to that question were fairly presented. No errors can be discerned in the giving or refusing instructions, nor in the admission or rejection of testimony. The question at issue was properly

submitted to the jury, and they decided it against the appellant.

There is one remaining question which has given us more trouble. The judgment is for $20,000, and a judgment of this magnitude in a case of this kind will, and should always, challenge the attention of the court, and compel the closest scrutiny of the testimony on which the verdict in this respect is based. But after such scrutiny, we are unable to say that the amount of the verdict was any indication of passion or prejudice on the part of the jury, or that it was more than would reasonably compensate the respondent for the injuries sustained and the suffering imposed. The respondent at the time of the injury was thirty-seven years old, and had a wife and five children depending upon him for support. We will not attempt to describe his condition in detail, but if the testimony of unimpeached doctors, who are evidently physicians of ability and standing and strangers to the respondent, is to be credited, to say nothing of the testimony of the respondent, he is left a broken and disjointed wreck, with no hope of improvement, and with nothing to look forward to but suffering and embarrassments. Appellant offered no testimony on the subject of the injury. Under such circumstances we would not be justified in interfering with the verdict of the jury.

The judgment will be affirmed.

RUDKIN, C. J., MORRIS, CHADWICK, and CROW, JJ., concur.

[No. 9061. Department Two. December 14, 1910.]

JENNIE L. WEST, *Respondent*, v. WILLIAM SHAW *et al* *Appellants*.[1]

NEGLIGENCE—DANGEROUS PREMISES — TRESPASSERS—LICENSE—REVOCATION — INSTRUCTIONS. In an action for injuries sustained by plaintiff in stepping into a post hole dug by a neighbor preparatory to putting up a fence, in which it was claimed by the defendants that they had revoked plaintiff's license to use a pathway over the land, both by notice and by tying the gate, it is error to refuse to give an instruction based upon defendant's evidence and theory of the case to the effect that there could be no liability to a trespasser, defined as one warned off the land.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered March 19, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by stepping into an unguarded post hole. Reversed.

Miller & Crass, for appellants.

R. H. Back, for respondent.

CHADWICK, J.—Appellants and a family named Richter were adjoining lot owners. The lot belonging to the Richters had been fenced. The home of respondent was to the east of the Richters. The Richter tract was bounded on the north and west by roads or streets, but for a long time a gate had been maintained in their south fence, through which a path led out onto the unfenced lots of the appellants. There was testimony tending to show that this pathway and gate had been used generally by those going to or coming away from the Richter home, for such a length of time and under such circumstances as would imply a license or consent to its use. The appellants and the Richters had some dispute as to the true line dividing their tract, and finally agreed that it should be nine feet north of the line fence theretofore

[1]Reported in 112 Pac. 243.

erected, thus placing it within the enclosure. Appellants accordingly caused post holes to be dug preparatory to moving the fence. The work was begun, but was not completed on the —— day of December, 1905. On the evening of that day respondent went to the Richter home to borrow some article of neighborly interchange, and in doing so inadvertently stepped into a post hole which had been dug but left unguarded by the workmen. She alleges that she sustained injuries, and from a verdict in her favor, this appeal is prosecuted.

Many errors are assigned, most of them going to the instructions given or refused. Assuming that the instructions will be recast upon another trial, we shall discuss only such as we deem materially prejudicial. One of the defenses was that respondent was a trespasser. There was testimony to the effect that respondent and appellant William Shaw had discussed the question of the boundary line, and that Mr. Shaw had ordered respondent to keep off of his premises; that he had put up a notice warning all trespassers off of the property, but that it had been torn down, and that one of those engaged in digging the post holes had securely tied the gate with a rope when he quit work between four and five o'clock in the afternoon. The accident occurred about five o'clock. Upon the duty owing to a trespasser by the owner of land, the court instructed the jury as follows:

"A party's liability to trespassers depends upon the owner's contemplation of the likelihood of their presence on the premises and the probability of injuries from contact with conditions existing there.

"If the owner of land digs a dangerous pitfall or excavation in a passageway or pathway used by people in going to and from a residence and known by the excavators to be so used, or reasonably could be anticipated or contemplated that it was and would be so used, then, the owner will be liable for a failure to take reasonable precautions to prevent injury to any person passing along said pathway with due care, whether he be a trespasser or a licensee. A failure to take

such reasonable precautions will be gross or wanton negligence.

"Wanton negligence is the failure of one charged with a duty to exercise an honest effort in the employment of all available means to prevent injury."

These instructions were excepted to, and the following instructions were requested by appellants:

"If you find that plaintiff was warned by defendants to keep off of their premises, and particularly the premises where the injury is alleged to have occurred, then you are instructed that if after being so warned plaintiff came onto defendant's property without invitation, express or implied, she was a trespasser and defendants owed her no duty except to refrain from wilfully injuring her.

"You are instructed that the rule applicable to trespassers is that the proprietor upon whose land the trespasser enters, is under no duty towards the trespasser, except that of refraining from wantonly or recklessly injuring him, after discovering his trespass or peril."

It is clear that the trial judge misconceived the law pertaining to the duty which appellants owed to respondent, in the event that the jury found she went upon the premises of the appellants in defiance of their orders. The pathway was not a public way, but was used under an express or implied permission of the owners of the property; and the most that could be claimed by any one was that the circumstances of its use had been such that it operated as an implied invitation to the public to use it. A revocation of this license or permission could be manifested in either of the ways set up by appellants—by notice, command, or by tying the gate.

"The general rule is that no duty exists towards trespassers except that of refraining from wantonly or wilfully injuring them. The principle that owners of property are bound to see that persons lawfully on such premises are not injured does not extend to those who are on the premises without right or without permission. So the owner of land is under no obligation or duty as to a mere trespasser to keep his premises in a suitable condition. The mere maintenance of a dangerous nuisance on one's inclosed premises gives no right of action

to one who without necessity and without the owner's invitation, express or implied, enters on such premises and is injured thereby." 29 Cyc. 442.

As we read the instructions, appellants were denied the right the law gives them of having the court instruct upon the theory of the defense tendered in the answer and sustained in some degree by competent testimony. Every litigant has a right to have his theory of the case presented to the jury. *State v. Messner*, 43 Wash. 206, 86 Pac. 636.

The judgment of the lower court is reversed, and a new trial ordered.

RUDKIN, C. J., MORRIS, DUNBAR, and CROW, JJ., concur.

[No. 8962. Department Two. December 15, 1910.]

AL. DENSMORE *et al.*, *Respondents*, v. EVERGREEN CAMP No. 147, WOODMEN OF THE WORLD *et al.*, *Appellants*.[1]

NUISANCES—WHAT CONSTITUTES — UNDERTAKING ESTABLISHMENTS —RESIDENCE DISTRICT. The maintenance of an undertaking establishment in the residence section of a city, within a few feet of residences, while not a nuisance *per se*, may be enjoined as a nuisance, where it appears that, although maintained with every sanitary precaution, noxious odors and gases will permeate the nearby residences, and that there is danger of infection and contagion; and notwithstanding the fact that the owner intends to occupy the second story of the building as a residence.

Appeal from an order of the superior court for Snohomish county, Joiner, J., entered March 23, 1910, in favor of the plaintiffs, enjoining the conducting of an undertaking business in the residence portion of a city. Affirmed.

Noah Shakespeare and *Bell & Anderson*, for appellants.

Cooley & Horan and *R. Mulvihill*, for respondents.

CHADWICK, J.—Hewitt avenue is the principal business street in the city of Everett. Wall street runs parallel

[1]Reported in 112 Pac. 255.

thereto. One of the cross streets is Hoyt street. A business block runs back from Hewitt avenue one hundred and twenty feet. The remainder of the block on Hoyt street is occupied by residences. The next block to the south is entirely given up to residences, so that, in the opinion of a witness who had been in the real estate business for ten years in the city of Everett, the property owned and occupied by the plaintiffs was situated in a residence district. A short time before this action was begun, Evergreen Camp No. 147, Woodmen of the World, had moved a three-story building, formerly used as a residence, onto lots 26 and 27. Plaintiffs Densmore are the owners of lots 28 and 29, and plaintiffs Mathewson are the owners of lots 23 and 24. The building owned by the Woodmen Camp now stands within three or four feet of the Densmore residence and about thirty-five feet from the Mathewson residence, being between the two. At about the time the building was moved onto the lots, it was leased by the Woodmen Camp to defendants Maulsby, who purposed to start an undertaking establishment therein. Plaintiffs protested to one or more of the officers of the Camp, and this proving of no avail, the present action was begun, resulting in a temporary injunction, after a full hearing upon the facts. Testimony offered to show that the property of appellants would be depreciated in value was excluded by the court.

That an undertaking establishment is not a nuisance *per se* may be assumed without citing authority. It is shown that it is the purpose of the appellant Maulsby to maintain every sanitary precaution known to the profession of morticians. The question before us is whether such an establishment, by reason of its location and being operated in a legitimate manner, may be or become a nuisance within the definition of the statutes of this state. In the case of *Everett v. Paschall, ante* p. 47, 111 Pac. 879, we called attention to the fact that the question of nuisance or no nuisance cannot be determined by reference to the rules

of the common law, but that each case must be considered upon its own facts. For in this age, when population is becoming more and more congested in the cities, it would be manifestly unfair to grant injunctive relief only in those cases where the object attacked was a nuisance *per se*, when other circumstances or conditions intervene which might tend to destroy the repose and comfort of a part of a city or town given over to homes. In this case, as in that, the element of comfort and repose in the enjoyment of the home becomes an essential element of our inquiry. For it is not only shown by the evidence, but it may be accepted as within the common knowledge of man, that the immediate presence of those mute reminders of mortality, the hearse, the chapel, the taking in and carrying out of bodies, the knowledge that within a few feet of the windows of one's dwelling house where the family sleep and eat and spend their leisure hours, autopsies are going on, that the dead are there, cannot help but have a depressing effect upon the mind of the average person, weakening, as the testimony shows, his physical resistance and rendering him more susceptible to contagion and disease. There is evidence tending to show that noxious odors, gases, especially those arising from the deodorants used in cleansing the premises, would permeate the homes of respondents; that there is danger of infection and contagion from the proximity of the morgue, and the possibility of flies passing from one place to the other. This testimony is supplied by physicians sworn as experts. Their testimony is denied or minimized by the appellant Maulsby and other undertakers who were called as witnesses, but the fact that reasonable men of fair minds differ upon these questions impelled the trial judge to find against appellants upon the facts, and warrants us in subscribing to his view that the danger is at least probable.

"The law takes care that lawful and useful business shall not be put a stop to on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves

of a fastidious or over refined person. But, on the other hand, it does not allow any one, whatever his circumstances or condition may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity. The maxim, *sic utere tuo ut alienum non laedas*, expresses the well established doctrine of the law." *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654.

We think the facts, as established by the evidence and found by the court below, bring this case within the rule of the cases cited in *Everett v. Paschall, supra; Deaconess Home & Hospital v. Bontjes*, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215; *Baltimore v. Fairfield Imp. Co.*, 87 Md. 352, 39 Atl. 1081, 67 Am. St. 344, 40 L. R. A. 494; *Cherry v. Williams*, 147 N. C. 452, 61 S. E. 267, 125 Am. St. 566.

In *Barnes v. Hathorn*, 54 Me. 124, a tomb had been erected within forty-four feet of the plaintiff's dwelling, in which dead bodies had been kept. They were finally removed, but after a lapse of six years a body was placed in the tomb. In reversing a judgment of nonsuit, the court said:

"It was only some fifteen paces from the windows of his dining and sitting room. It was certainly not a very cheering or exhilarating prospect which met the plaintiff's vision, whenever he looked abroad. How far, to a man of ordinarily nervous temperament, or to one of a sensitive nature, who shrunk from the constant view of this fixed memorial of death and decay, this erection might prove injurious to health, it is impossible to say. . . . In addition to this, we have the testimony of the physicians called on the trial, that *any* emission from dead bodies in that tomb might be injurious to health, bodily and mentally. It had proved so before, and might again. A single body might not be so liable to create deadly or noxious effluvia as a larger number. But it would be of the same general character, and might of itself prove uncomfortable, if not positively unhealthy."

The fact that some courts have not drawn a consistent line between nuisances *per se* where the injury is real and hurtful to the physical senses, and those cases where the nuisance is mental or destructive of comfort and repose, has led to

much confusion. But the rule that a thing may or may not be a nuisance according to the manner in which it is used, or the situation in which it is placed, or the time it has been carried on without complaint, when measured by the mind and taste of the average citizen, furnishes a guide as certain as it is possible to state a rule in a class of cases where, at best, there must be an element of compromise.

The case of *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490, is relied upon by appellants. It is the only case cited and, so far as we have been able to discover, it is the only case in the books, where it was sought to restrain an undertaking establishment. It is seemingly in point, yet it may be distinguished from the case at bar. There, so far as the decision indicates, the undertaking establishment was in the most populous section of the city. We may assume that it was not in a residence section, for the lower floor of the building occupied by the complainant was given over to business purposes, the upper floors only being occupied for residence purposes; and further, the establishment had been carried on without complaint for eleven years. Furthermore, the court found that the complainant was of a supersensitive nature rather than one possessed of the plain, sober, and simple notions prevailing among the English people, as is stated in the books; that he had a horror of such things in excess of the ordinary person, so much so that in the seventy-two years of his life he had not attended to exceed half a dozen funerals. We think, from reading that opinion, that it comes within the rule announced in *Gilbert v. Showerman*, 23 Mich. 447, where the complainant had taken up his residence over a store in a part of the city chiefly given up to business, and then sought to restrain the operation of a steam flouring mill located on adjoining property. Chief Justice Cooley, who rendered the opinion of the court, speaking of offensive trades, said:

"Even the most offensive trade, as we have seen, is allowed to be carried on in a *remote* place; and this means, not a place

remote from all other occupations and trades, but remote from such other occupation or trade as would be specially injured or incommoded by its proximity; in other words, in a place, which, in view of its offensive nature, is a proper and suitable one for its establishment. The most offensive trades are lawful, as well as the most wholesome and agreeable; and all that can be required of the men who shall engage in them is, that due regard shall be had to fitness of locality. They shall not carry them on in a part of the town occupied mainly for dwellings, nor, on the other hand, shall the occupant of a dwelling in a part of the town already appropriated to such trades, have a right to enjoin another coming in because of its offensive nature. Reason, and a just regard to the rights and interests of the public, require that in such case the enjoyments of pure air and agreeable surroundings for a home shall be sought in some other quarter; and a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it. In the case before us we find that the defendants are carrying on a business not calculated to be specially annoying, except to the occupants of dwellings. They chose for its establishment a locality where all the buildings had been constructed for purposes other than for residence. Families, to some extent, occupied these buildings, but their occupation was secondary to the main object of their construction, and we must suppose that it was generally for reasons which precluded the choice of a more desirable neighborhood."

The testimony in this case further shows that it is the intention of the defendant Maulsby to occupy the upper stories of the building as a residence, but we believe that this fact will not take this case out of the general rules of the law. In *Cleveland v. Citizens Gas Light Co.*, 20 N. J. Eq. 201, 205, Chancellor Zabriskie, who is perhaps more frequently quoted as an authority upon the subject of nuisance than any other American jurist, said:

"The discomforts must be physical, not such as depend upon taste or imagination. But whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so because there may be persons whose habits and occupations have

brought them to endure the same annoyances without discomfort. Other persons or classes of persons whose senses have not been so hardened, and who, by their education and habits of life, harden the sensitiveness of their natural organization, are entitled to enjoy life in comfort as they are constituted."

Mr. Bishop, in his Non-Contract Law, § 418, has stated the underlying principle in this class of cases as follows:

"Two things essential to the general prosperity and happiness are useful trades, whereby people are supplied with things necessary in life, and healthful and peaceful dwellings. . . . The courts, in administering justice between them, necessarily require each to lay aside something of what pertains to mere convenience and comfort, yet they permit each to stand so far on its own rights as not to be destroyed."

The decree of the lower court, being thus sustained by the authorities upon the subject, is affirmed.

RUDKIN, C. J., MORRIS, DUNBAR, and CROW, JJ., concur.

[No. 9097. Department One. December 15, 1910.]

AUGUST ANDERSON *et al.*, *Appellants*, v. J. W. WOOLLEY *et al.*, *Respondents*.[1]

DEEDS—DELIVERY—EVIDENCE—SUFFICIENCY. The presumption that a deed, properly executed and in the possession of the grantees, was duly delivered can only be overcome by clear and convincing proof; and such proof is not made where it appears that the grantors voluntarily surrendered the granted premises to the grantees, entered upon premises taken in exchange, and consumed personal property received in exchange, and paid an agent's commission long after the alleged fraud in securing possession of the deed from one of the grantors while intoxicated.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION. The discretion of the trial court in refusing a new trial for newly discovered evidence, based upon affidavits of discredited witnesses, will not be disturbed on appeal.

[1]Reported in 112 Pac. 271.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 24, 1910, in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to vacate a deed for fraud. Affirmed.

Belt & Powell, for appellants.

Nuzum & Nuzum, for respondents.

RUDKIN, C. J.—The plaintiffs in this action were the owners of a town lot in the city of Spokane, and the defendants of a forty-acre tract in Spokane county, adjacent to the city, together with certain personal property situate thereon. Some time prior to the 30th day of April, 1908, the parties agreed upon an exchange of these properties, and entered into a contract to that effect, which does not appear in the record. On the last mentioned date, the plaintiffs executed a deed of the Spokane property in favor of the defendants, and the defendants in turn executed a deed in favor of the plaintiffs for the forty-acre tract, and also a bill of sale for the personal property. The present action was instituted to set aside the deed executed by the plaintiffs, or to procure a reconveyance of the property therein described, on the ground that the deed was fraudulently obtained from the possession of the plaintiff August Anderson while intoxicated, and its delivery was never authorized or assented to by the plaintiff Emelia Anderson. The case was tried before the court without a jury, and from a judgment in favor of the defendants, the plaintiffs have appealed.

It is an admitted fact that a deed properly executed and acknowledged by the appellants passed into the custody and under the control of the grantees therein named, and was filed for record. This fact alone gives rise to a strong presumption that the deed was delivered and became operative, a presumption that can only be overthrown by clear and convincing proof. *Jackson v. Lamar*, 58 Wash. 383, 108 Pac. 946, and cases cited. When this presumption is aided by the further

admitted facts that the appellants voluntarily surrendered possession of the granted premises to their grantees, immediately after the delivery of their deed; entered upon the possession of the premises taken in exchange; consumed and necessarily treated as their own a considerable part of the personal property received in exchange, and paid a commission to the agents who perpetrated the alleged fraud, long after the delivery of the deed, the presumption becomes well-nigh absolute and conclusive. The theory advanced by the appellants is this: they contend that Mrs. Anderson was unwilling to sign or execute the deed, until she had made a further examination of the property to be taken in exchange; that she finally executed the deed with the express understanding that the deed should remain in her possession, undelivered, until such further examination was made; that the husband obtained possession of the deed from the wife, with strict injunctions not to deliver it, and that the respondents or their agents fraudulently obtained possession of the deed from the husband while intoxicated.

The contention of the respondents, on the other hand, is that the deed was executed by both husband and wife for the purpose of making a delivery thereof; that an examination of the abstract disclosed some defect in the respondents' title, which rendered it necessary to obtain a deed of correction from parties residing in the state of Wisconsin; that the appellants left their deed with their attorney until the deed of correction was returned, and that after the receipt of the latter deed, the deed from the appellants was delivered and placed of record. The court below made no findings of fact, but it evidently adopted the respondents' theory of the case, and with that conclusion we are in entire accord. The conduct of the appellants was in many respects utterly inconsistent with their present claims, and in many other respects their testimony was utterly discredited. The court below saw the parties and their witnesses, observed their demeanor, and its conclusion finds ample support in the record.

A motion for a new trial was interposed on the ground of newly discovered evidence. The affidavits in support of the motion were made by parties who had already testified on the trial. The denial of this motion is assigned as error, but the court acted within its discretion. The reasons for the denial of the motion do not appear, but the court might well have proceeded on the theory that it was so little impressed with the testimony already given by these witnesses that any further testimony they might offer would not change the result.

Finding no error in the record, the judgment is affirmed.

PARKER, GOSE, FULLERTON, and MOUNT, JJ., concur.

[No. 9011. Department One. December 16, 1910.]

McPHERSON BROTHERS COMPANY, *Appellant*, v. OKANOGAN COUNTY *et al.*, *Respondents*.[1]

JUDGMENT—RES JUDICATA — BAR — MATTERS CONCLUDED. The dismissal of an action to specifically enforce a public sale of county property, on the ground that no bad faith of the officials appeared, is *res judicata* and a bar to another action between the same parties to enforce the same contract on the allegations of bad faith, that having been set up in the first complaint in the former action and abandoned by the filing of an amended complaint.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered December 27, 1909, in favor of the defendants, dismissing an action for specific performance, upon overruling a demurrer to the answer. Affirmed.

Peter McPherson, for appellant.
Alvin W. Barry, for respondents.

MOUNT, J.—The appellant brought this action, seeking to specifically enforce an alleged contract for the purchase of certain real estate. The respondents, for answer to the

[1]Reported in 112 Pac. 267.

complaint, denied the material allegations necessary to recovery, and pleaded affirmatively that the action was barred by time, and also that there has been a former adjudication of the subject-matter of the action between the same parties. The plaintiff filed a demurrer to the affirmative matter alleged in the answer. The court overruled this demurrer, and the plaintiff electing to stand thereon, the action was dismissed. Plaintiff has appealed.

It is conceded in the case that the parties and the subject-matter of the action are the same as in a prior action which was decided adversely to the appellant below, and which was appealed to this court, and upon such appeal we held that there was no contract between the parties which could be specifically enforced. *McPherson Brothers Co. v. Okanogan County*, 45 Wash. 285, 88 Pac. 199. We said in that opinion:

"The record here is silent as to the reason that the officer refused to accept the appellant's bid, but nothing is alleged in the complaint to overcome the presumption that the officer acted in good faith, and within his best judgment."

After the decision in that case, the appellant brought this action, and alleged bad faith of the officers in addition to the facts set out in the original complaint, upon which the case was finally submitted to this court in the case above cited. Appellant now argues that, by reason of these allegations of bad faith on the part of the county officers, the case was not finally adjudicated upon the other appeal. The answer in this case shows, that there was an original complaint and two amended complaints in the former action; that in the original and in the first amended complaint, allegations were made of bad faith on the part of the officers, substantially the same as in the complaint in this action, but when the second amended complaint was filed in the other action these allegations of bad faith were omitted. It clearly appears, therefore, that the appellant knew all the facts now alleged at the time the first action was brought. The general rule is,

and has often been stated by this court, that "in an action between the same parties a judgment therein is *res adjudicata* as to all points in issue, and also all points which might have been raised and adjudicated." *Olson v. Title Trust Co.*, 58 Wash. 599, 109 Pac. 49, and cases there cited.

In *Sweeney v. Waterhouse & Co.*, 43 Wash. 613, 86 Pac. 946, we said:

"It is hardly worth while to go into a discussion of the doctrine of *res adjudicata* and the cases cited thereon. This court has, in more recent cases, somewhat modified the doctrine as announced in the earlier cases, where the old rule was laid down that the plea of *res judicata* applies not only to points which were raised, but to those which might have been raised in the trial of the former action. But no court, we think, has gone so far as to allow a litigant to experiment with a court by trying his case piecemeal. The cause of action which the appellants now urge was available to them at the former trial. . . . They should not be allowed to split their causes of action, try their case out on a part of their causes and, if they fail, commence another action setting forth the other causes."

This is precisely what the appellant in this case has attempted to do. It brought its first action upon an alleged contract which it claimed arose out of a bid it had made for land offered at public sale by the county. It alleged in its original complaint that the officers conducting the sale had acted in bad faith in not striking the land off to it. It subsequently abandoned this allegation, and the case was submitted upon a complaint which alleged a completed contract. The case was appealed, and we held there was no enforcible contract, and stated that there was no claim of bad faith. Then plaintiff brought another action against the same parties, based upon the same causes, alleging bad faith. It selected the ground upon which it based its original cause of action and was defeated. Under the rule stated above, it is bound by the decision in that case.

The judgment must therefore be affirmed.

Rudkin, C. J., Parker, Fullerton, and Gose, JJ., concur.

[No. 9063. Department One. December 16, 1910.]

ISADORE M. GLADDEN, *Appellant*, v. ADAM JACOBOWSKI *et al.*, *Respondents*.[1]

JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. The dismissal of an action to rescind a contract to support the plaintiff, on the ground that plaintiff had violated the contract in refusing to live with the defendant since August 20th, 1908, is *res judicata* and a bar to another action to rescind the same contract for failure to support the plaintiff from August 20th, 1908, to August 20th, 1909, commenced within fifty days after the entry of the former judgment; no breach since such judgment being alleged.

CONTRACTS—SUPPORT—CONSTRUCTION. Under a contract for life support at defendant's home, providing that plaintiff shall not refuse to reside with defendant except for defendant's neglect or failure to suitably provide for plaintiff, in which event defendant was to pay $15 per month, defendant is not liable for the monthly payments where plaintiff unjustifiably refused to reside with defendant.

Appeal from a judgment of the superior court for King county, Clifford, J., entered August 8, 1910, dismissing on the pleadings and the opening statement of counsel an action on contract. Affirmed.

John E. Humphries and *Geo. B. Cole*, for appellant.

S. H. Steele, for respondents.

MOUNT, J.—The appellant brought this action to rescind two written contracts by which he had conveyed to the respondents certain personal property and real estate, in consideration for support and maintenance during his lifetime. As a ground for the rescission, he alleges that there became due from the respondents, under the terms of the contract, $15 per month from August 20, 1908, to August 20, 1909, amounting to $180, which respondents refused to pay. Respondents, for answer to the complaint, denied these allegations, and alleged affirmatively a former adjudication, and

[1]Reported in 112 Pac. 268.

set forth the record of the former case. For reply to the allegations of the former adjudication, the appellant filed a general denial upon information and belief. The cause came on for trial to the court without a jury, and counsel for the appellant made a statement of the case, in which he recited the history of the former litigation, in substance admitting the allegations of the reply in reference thereto, and then stated:

"The plaintiff did not appeal, and this suit is brought on this theory to a great degree, as we allege in the complaint that the defendants have failed to pay the plaintiff the $15 per month as provided in the deed, he not living there at the home of the defendants, he claims on account of the treatment he received, and this suit is founded mainly upon that ground and also upon the ground that the defendants have transferred the greater portion of the personal property over to Mrs. Jacobowski. . . . The turning point perhaps in this case to a great degree will rest upon that clause regarding residence and the payment of $15 per month."

The clause in the contract referred to, and which was admitted in the pleadings, is as follows:

"And in consideration of the premises, the parties of the second part doth hereby for themselves, their executors and administrators, agree to and with the party of the first part that they will support and maintain and comfortably and sufficiently clothe the party of the first part and in all respects care and provide for him in the manner suited to his condition in life for and during the remainder of his natural life; provided, however, that the said party of the first part shall not refuse to reside at the home and residence of said second parties in the said King county, or elsewhere to which said parties may remove except such refusal may be occasioned by neglect or inability of the party of the first part to obtain comfortable and sufficient clothing, lodging and maintenance sufficient to one in his station and condition in life at the home of said second parties, the total liability to which said second parties shall be held in the event that said first party shall determine not to live at the home and residence of said second parties shall not exceed the sum of $15

per month during the time of his refusal to live at the home and residence of said second parties."

Thereupon the respondents moved the court to dismiss the action upon the pleadings and the opening statement of counsel for the plaintiff. This motion was granted, and the plaintiff has appealed from the order of dismissal.

Counsel for appellant relies upon the rule to the effect that, where land has been conveyed in consideration of the grantee's agreement to support the grantor during the latter's life and the grantee refused to perform the same, the court of equity will set aside the deed, as held by this court in *Gustin v. Crockett*, 51 Wash. 67, 97 Pac. 1091, and cases there cited. That rule, however, has no application to the facts admitted in this case, for here the appellant had brought a former action, wherein it was alleged that the defendants had failed and refused to support and maintain the plaintiff, and the court found upon the trial of that case, "that the said defendants at all times had been ready, able and willing to support and maintain the plaintiff at their home and to fully comply with the obligations imposed upon the said defendants by the terms of said deed." The court in that action also construed the provisions of the contract above set out, and found upon the trial "that said plaintiff without cause or excuse on or about the 20th day of August, 1908, refused to reside at the home and residence of said defendants and refused to accept and receive support and maintenance from the said defendant at the home of said defendants." It is therefore clear that the judgment in that action was *res adjudicata* upon the issues between the parties, up to the time of that decree. *McPherson Bros. Co. v. Okanogan County, ante* p. 239, 112 Pac. 267. It is not alleged in this action, and it is apparently not claimed, that there has been any breach of the contract since the date of that decree. It appears that this action was brought within fifty days after that decree was entered. The complaint in this case does not even allege the breach of the

conditions of the contract. It simply alleges, "that pursuant to the terms of said agreement, there became due and payable to said plaintiff from said defendants the sum of $15 per month from August 20, 1908," and that a demand was made therefor, which defendants refused to pay.

It is plain from the terms of the contract that the respondents did not agree to pay the appellant $15 per month. The contract provides that the respondents will support, maintain, and comfortably and sufficiently clothe the appellant, provided that he shall not refuse to reside at the home and residence of the defendants, "except such refusal may be occasioned by neglect," or inability of the appellant to obtain such maintenance at the home of the respondents. Then the contract provides that the total liability of the respondents shall not exceed the sum of $15 per month. It is plain, we think, that the appellant is not entitled under the contract to recover $15 per month, or any other sum, unless it is shown that the respondents refused or neglected to provide for appellant at their home. No such allegation is made in the complaint. It is true, counsel for the appellant stated in opening the case that the appellant is "not living at the home of the defendants; he claims on account of the treatment he received." This question was admittedly litigated in the other action, and was decided adversely to the claim of the appellant, and that finding was conclusive of the fact up to the time of the judgment therein. There is no allegation or claim that there has been any neglect since that time, or any breach of the contract by the respondents, and it is clear that the appellant could not, under the terms of the contract, capriciously refuse to live at the home of the respondents, and require them to pay $15 a month or suffer a rescission of the contract; yet this is apparently the sole purpose of the action.

We think the judgment was right, and it is therefore affirmed.

RUDKIN, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 8863. Department One. December 16, 1910.]

In re SOUTH SHILSHOLE PLACE.

W. W. ROBINSON, JR., *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS — SPECIAL ASSESSMENTS — OBJECTIONS — WAIVER. *Semble*, that parties to a proceeding to condemn land for a city street who fail to object that the ordinance for condemnation was duplicitous cannot raise the objection on appeal from the assessment of damages (PARKER, J., dissenting).

SAME—SEPARATE STREET EXTENSIONS—ORDINANCE — OBJECTS—DUPLICITY. An ordinance for the condemnation of several strips of land, from one-fourth to one-half a mile apart, for several streets, embraces but a single object and is not void for duplicity, where it appears from the maps that it was all one general plan to create a connected way between two points.

SAME—STREET IMPROVEMENTS — BENEFITS. The eminent domain commissioners are vested with a discretion in determining the benefits from the opening of a street, and the opening of a city street through a tract of unplatted land is presumed to be a special benefit.

SAME—COSTS AND EXPENSES. Rem. & Bal. Code, § 7787, providing that eminent domain commissioners, in assessing the property benefited, shall include all costs and expenses of the proceedings to the time when the proceeding was referred to them, and probable future costs and expenses, authorizes the inclusion of costs of preparing and serving the condemnation proceeding, and of expert witnesses, engineers' expenses, etc.

SAME—DAMAGES—GRADES—EVIDENCE — ADMISSIBILITY. In a proceeding to assess the benefits to property by reason of the condemnation of a public street through the tract, in which it appeared that a reasonable grade would require a cut, but no grade had been established, confirmation of the assessment without inquiry into the effect of the grade is error.

Appeal from a judgment of the superior court for King county, Albertson, J., entered August 16, 1909, confirming an assessment roll for a local improvement, after a hearing on the merits. Reversed.

Todd, Wilson & Thorgrimson, for appellants.
Scott Calhoun and *King Dykeman*, for respondent.

[1]Reported in 112 Pac. 228.

Gose, J.—The city of Seattle, by Ordinance No. 15,923, provided for the laying off, extending and establishing of South Shilshole Place, Emerson street, and an unnamed street, as public streets, and for condemning five detached tracts of land for that purpose. The ordinance provided that an assessment should be made upon the property benefited, for the purpose of compensating the owners of the property taken, and for the costs of the proceeding, in the manner provided by law. Thereafter, in obedience to the provisions of the ordinance and the statute, a jury trial was had for the purpose of ascertaining the just compensation to be made for the private property taken or damaged. After the return of the verdict, a judgment was entered whereby it was decreed that, upon payment to the respective owners or into the registry of the court of the amount found by the jury and taxable costs of the proceeding, the city should be entitled to the possession of the land taken. Damages in the sum of $2,850 were awarded to the appellants. The appellants are the owners of a tract of unplatted land through which Shilshole Place is sought to be extended. The board of eminent domain commissioners, to whom the matter was referred, prepared and filed an assessment roll, for the purpose of creating a fund with which to pay the damages awarded and the costs and expenses of the proceedings. The appellants in due time filed written objections to the assessment. This appeal was taken from a judgment confirming the assessment.

Three questions are presented; (1) it is asserted that the ordinance contains more than one subject, and that it therefore conflicts with sec. 10, art. 4, of the city charter; (2) that the assessment contains items of costs that cannot be assessed to the property; and (3) that the court erred in refusing to admit testimony in regard to the probable cut to be made upon the appellants' property. These questions will be treated in the order stated.

The appellants were parties to the condemnation proceed-

ing, and did not raise the question that the ordinance was duplicitous. A valid ordinance was a prerequisite to the right to condemn. It would seem that the point was, at that hearing, decided adversely to the present contention, and that the decree of necessity foreclosed a further hearing upon that ground. However, assuming that the question is open, under the authority of *In re Third, Fourth and Fifth Avenues, Seattle*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862, we do not think that the objection is tenable. An examination of the maps in the record discloses that the purpose of the city in condemning the several strips of property was to create a connected way from the Lake Washington canal to Fort Lawton. To accomplish this purpose, it was necessary to condemn five separate pieces of property lying from one-fourth to one-half a mile apart. It is, however, all involved in the one general plan, and creates a continuous but sinuous course between the termini. We think the ordinance embraces but a single object. *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36; *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 659, 104 Pac. 1121.

In the *Weed* case the title of the act was: "An act providing for condemnation proceedings for right of way for irrigating ditches, canals, and flumes for agricultural and mining purposes and relating to right of appropriation of water." It was contended that there was a union of two distinct objects, viz., one pertaining to the condemnation of the right of way, and the other pertaining to rights of persons engaged in irrigation to appropriate water. It was held that neither the title to the act nor the act itself is duplicitous, and that the act would have been valid under the less detailed title of: "An act relating to the appropriation of water." In the *Sylvester* case a like objection was made to an ordinance entitled:

"An ordinance providing for the laying out, widening, extending and establishing of Meadow Place, University Boulevard and East Seventieth street, as public streets, high-

ways, boulevards and park ways in the city of Seattle, between East Green Lake Boulevard and Fifteenth Avenue Northeast, over and across certain lots, blocks, tracts and parcels of land in said city, and providing for the condemnation and appropriation to the public use as a park of certain other lands and premises adjoining and proximate thereto, and providing for the taking and damaging of land and other property necessary therefor, . . ."

It was claimed that the ordinance provided for two separate and distinct objects: (1) the condemnation of certain property for streets, and (2) the condemnation of certain other property for a park. In that case, we said:

"The charter provision does not forbid the lawmaking body from passing an ordinance having a general object, and it may bring within its scope any number of sub-subjects germane to the general subject. Whatever is legitimately connected with a unified subject may be embraced in a single title or act;"

and that the ordinance was valid.

The appellants cite *Weckler v. Chicago*, 61 Ill. 142; *People ex rel. Raymond v. Latham*, 203 Ill. 9, 67 N. E. 403, and *Arnold v. Cambridge*, 106 Mass. 352. In the *Weckler* case an ordinance was held invalid, in that it combined two distinct improvements which provided for widening an alley running north and south through a block, and for opening an alley running east and west through the same block to intersect with the alley running north and south. In the *Latham* case, a later case from Illinois, an ordinance was held invalid which provided for the laying of more than forty separate and disconnected sidewalks located on twenty-five different streets in the village of Willamette, and in diverse and widely separated parts of the village, aggregating about seven miles of cement sidewalk. It was held that the ordinance was in violation of the general law of the state which gave authority to villages to construct sidewalks. The court was considering the language of a special sidewalk statute. The case, however, in principle upholds the validity

of the ordinance under consideration. Speaking to the question of the power of the city to unite one general scheme of improvement in a single ordinance, the court said:

"It is true that a single ordinance, providing for paving one or more streets, or providing for a system or common scheme for laying sewers, service pipes or drains has been held by this court to be a valid and legal ordinance. Where, in such case, many streets and parts of streets have been embraced in the scheme of improvement adopted by the city, they have been all regarded as parts of the same improvement. But the cases, where this rule has been announced, and where such double improvements made by a single ordinance have been endorsed and approved, have arisen under other provisions of the law than the sidewalk act of 1875. Thus, in *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261, it was held that an ordinance for the paving of several streets and alleys and parts of streets with the same materials, and in the same way, was not obnoxious to the objection that it embraced more than one improvement. The principle announced in *City of Springfield v. Green, supra*, was applied to a system of sewerage in *Drexel v. Town of Lake*, 127 Ill. 54, 20 N. E. 38, and *Village of Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327, and *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. 750; and to a system of drains and sewers, as in *Walker v. People*, 170 Ill. 410, 48 N. E. 1010; and to sewer and water service pipes, as in *Palmer v. City of Danville*, 154 Ill. 156, 38 N. E. 1067; and to a main sewer with lateral branches, as in *Payne v. Village of South Springfield*, 101 Ill. 285, 44 N. E. 105. In all such cases, a special benefit is supposed to be conferred upon the property taxed, and in theory, at least, there is supposed to be a common benefit flowing from the improvement as a whole."

In the *Arnold* case, it was held that a sidewalk statute did not confer the power upon the city to include sidewalks in two different streets in a single assessment.

The appellants argue further that an inspection of the map makes it apparent "that the inclusion of several of these streets was of no benefit whatever to appellants' property." As we have seen, their property is unplatted, and South Shilshole Place as projected extends through it from

east to west. The same objection could be made to the opening of a new street of a considerable length. Something must be left to the good judgment of the commissioners. The absence of benefit in the case at bar cannot be declared as a matter of law. As was said in the *Latham* case, in all such cases a special benefit is supposed to be conferred upon the property taxed, and in theory there is supposed to be a common benefit flowing from the improvement as a whole.

The record discloses that, in addition to the amount of the awards given for the several parcels of land, there was included in the assessment the costs of the corporation counsel in preparing and serving the petition in the condemnation suit, the costs paid expert witnesses, and other costs of the trial, the amount paid the city engineer for making the surveys and platting the same, the fees of the eminent domain commissioners, the estimated costs of the city treasurer in collecting the assessments, and the estimated interest on the awards. It is claimed that these items of expense cannot be assessed against the property benefited by the improvement. Section 20, Laws of 1907, page 323 (Rem. & Bal. Code, § 7787), provides:

"Such city may file in the same proceeding a supplementary petition, praying the court that an assessment be made for the purpose of raising an amount necessary to pay the compensation and damages which may or shall have been awarded for the property taken or damaged, with costs of the proceedings, or for such part thereof as the ordinance shall provide. The said court shall thereupon appoint three competent persons as commissioners to make such assessment, or if there be a board of eminent domain commissioners of such city, appointed under the provisions of this act, said proceeding for assessment shall be referred to said board. Said commissioners shall include in such assessment the compensation and damages which may or shall have been awarded for the property taken or damaged, with all costs and expenses of the proceedings incurred to the time of their appointment, or to the time when said proceeding was referred to them, together with the probable further costs and ex-

penses of the proceedings, including therein the estimated costs of making and collecting such assessment."

The section quoted discloses a two-fold purpose; first, to assess the property for the purpose of paying the aggregate amount awarded to the owners of the property; the interest follows as an incident to the award; and second, to include in the assessment "all costs and expenses of the *proceedings* incurred, to the time when said *proceeding* was referred to them, together with the probable further costs and expenses of the *proceedings*." The change from the singular to the plural number, and the use of the words "all costs and expenses of the proceedings," clearly indicate an intention to make the property benefited carry the entire burden of the improvement. The appellants have cited in support of their view, *Chicago v. Cook*, 105 Ill. App. 353. The Illinois statute empowers the commissioners to include the "costs" of the assessment, as contradistinguished from our statute which includes "costs and expenses." The case is therefore not in point.

The appellants were awarded $2,850 in the condemnation proceedings, and their property was assessed for $1,296 by the commissioners. One of the commissioners testified on cross-examination that he was not an engineer, but that he would "judge from the looks of the land" that a reasonable grade of the street would require a cut. The corporation counsel thereupon stated that, in the hearing of the condemnation proceeding, "it was understood that a reasonable grade should be put through," and that the court allowed that question to go to the jury. Counsel for the appellants then stated: "If that is the case, I think I have a right to show what the effect of the grade would be upon the property." The court then ruled that he was not going into the question of grades, and that the "question is, will the property be benefited by this highway, the mere extension of the street across the tract." This ruling is assigned as error. We think the assignment has merit. The ordinance

did not establish the grade of the street. The appellants had a right to inquire whether the commissioners had considered the physical features of their land, and whether a reasonable grade, which it may be assumed will be made, had been considered by them in assessing benefits. It is obvious that the benefits to them may be materially affected by the presence or absence of a cut through their property. The appellants had a right to inquire as to this matter, and the order confirming the assessment without permitting it was error. *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061, has reference to platted streets. There is no merit in the other points raised.

The judgment is reversed, with directions to permit the appellants to inquire whether the matter of a reasonable grade through their property was considered by the commissioners, and what effect, if any, it will have upon the benefits to the property.

RUDKIN, C. J., FULLERTON, and MOUNT, JJ., concur.

PARKER, J. (concurring)—I reluctantly yield my assent to the views of the majority, to the effect that these five separate pieces of property, lying separated at such a distance from each other as they are, will, when acquired by the city, all become a part of a single homogeneous local improvement, such as the spirit of the law contemplates it shall be, to support a local assessment. It clearly never was intended, and the authorities cited by the majority so indicate, that widely separated improvements could be united and called one improvement, for the purpose of local assessment, unless they clearly formed one improvement. Each part of a local improvement must have some relation to every other part, and the proximity of the parts is a very important matter to be considered in determining such relation. This does not necessarily mean that all parts shall be physically contiguous; but they must all clearly be a part of one scheme or plan, which when completed can be said to

be a single improvement. I conceive the correct rule to be, that the improvement must be such that the benefits forming the basis for the assessment flow from the *whole improvement*, not merely from some part of it, to each of the properties sought to be charged with the expense of its creation, and when any substantial part of the improvement does not have this effect, the spirit of the law is violated. This is in harmony with *New Whatcom v. Bellingham Bay Imp. Co.*, 9 Wash. 639, 38 Pac. 163, though the principle is not very elaborately discussed in that case. I think the city, in this case, has gone to the very limit permitted by law, in its uniting of such widely separated parts to constitute a local improvement. With these observations I yield concurrence with the majority upon this question.

I dissent from the view of the majority which seems to assume that appellants are precluded from raising the question above discussed, since they did not raise it upon the hearing of necessity in the condemnation proceeding. The question of assessment was in no way involved at that hearing. The principles I have discussed above would have no bearing upon the city's right to condemn. If appellants were parties to that proceeding, it was not for the purpose of hearing any question touching the assessment of their property. Indeed, the statute expressly provides for the process and procedure by which jurisdiction over the property owner is to be acquired to adjudicate the assessment. While the two proceedings are under the one title, they are as separate and distinct as can be, so far as acquiring jurisdiction over the parties and hearing of the questions involved is concerned. One is a pure eminent domain proceeding, while the other is a local assessment proceeding, each based upon separate pleadings and separate process.

I concur in the result.

[No. 8656. Department One. December 16, 1910.]

MARY DELASKI *et al.*, *Appellants*, v. NORTHWESTERN IMPROVEMENT COMPANY, *Respondent*.[1]

APPEAL—RECORD—STATEMENT OF FACTS — TIME. Where the last day for filing a statement of facts falls on Sunday, it may be filed on the following day, under Rem. & Bal. Code, § 252.

SAME—STATEMENT OF FACTS — CONTENTS — CERTIFICATE. A statement of facts containing the evidence in narrative form is sufficient when certified to contain all the material evidence and testimony introduced upon the trial.

MASTER AND SERVANT—SAFE PLACE—COAL MINES—VENTILATION—EVIDENCE—SUFFICIENCY. There is sufficient proof of failure to comply with Rem. & Bal. Code, § 7381, requiring sufficient circulation of air in a coal mine, where a battrice for the purpose of deflecting the air into a certain room was torn and defective, and one man therein lost his life and a boy became sick from inhaling poisonous gases.

SAME—COAL MINES—LENGTH OF HEADING — STATUTES — PERMISSION—BURDEN OF PROOF. Under Rem. & Bal. Code, § 7382, prohibiting the driving of a heading in a coal mine more than sixty feet from the face of each chamber without written permission from the inspector, the burden of proof, after proof of such extension, is upon the coal mine owner to show the fact of written permission therefor.

SAME—COAL MINES—VIOLATION OF STATUTORY PROVISIONS. It is negligence *per se* to fail to comply with the requirement of the coal mine law intended to provide a reasonably safe place for the men to work; and the duty is a nondelegable one.

SAME—STATUTORY PROVISIONS—APPLICATION. The provisions of the coal mine act of 1888, page 41, § 15, expressly limited to "violations of this act" if not superseded has no application to later acts on this subject.

SAME—NEGLIGENCE—NEGLIGENCE OF FELLOW SERVANT—CUSTOMARY VIOLATION OF RULES. It is no defense to an action for the death of a coal miner that it was due to the negligent act of a fellow servant in firing a blast, during shifts, contrary to the rules, where (1) there were concurring acts of negligence by the master contributing to the injury, or (2) where there had been habitual violations of the rule for three months, from which knowledge of the practice would be imputed to the master.

[1]Reported in 112 Pac. 341.

SAME—CONTRIBUTORY NEGLIGENCE. A coal miner is not guilty of contributory negligence, as a matter of law, from the fact that he returned to work fifteen minutes after he heard a blast and saw smoke, and remained at work three-quarters of an hour, when he was on his way out when overcome by gas.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 10, 1909, in favor of the defendant, upon granting a nonsuit in an action for damages for the wrongful death of an employee in a coal mine. Reversed.

W. R. Bell, for appellants.

Carroll B. Graves and *Charles H. Winders*, for respondent.

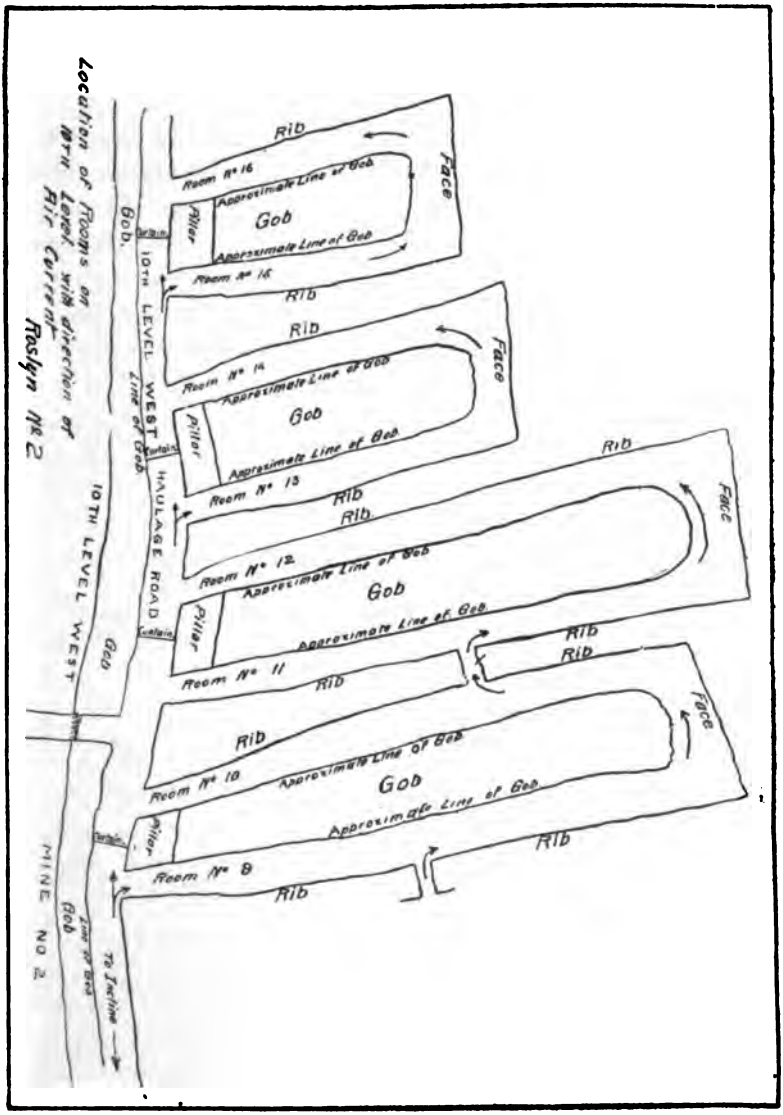
GOSE, J.—The appellants are respectively the surviving wife and minor children of John Delaski, deceased. They brought this action to recover damages sustained by reason of the death of the husband and father, alleging that his death was caused by the inhalation of poisonous gases negligently permitted to accumulate in the coal mine of the respondent. At the close of the appellants' evidence, a judgment of nonsuit was entered. This appeal followed.

The respondent has moved that the statement of facts be stricken and the judgment affirmed. The grounds of the motion are, (1) that the statement was filed on the ninety-first day after the entry of the judgment, and (2) that the certificate of the judge is defective in that he only certified that the statement contains "all the material evidence and testimony introduced upon the trial." A part of the evidence set forth in the statement is in a condensed and narrative form. On the 2d day of August, which was the 84th day after the time for taking the appeal had commenced to run, an order was entered giving the appellants until the 8th day of August, which was the 90th day, in which to file and serve a statement of facts. The 8th day of August fell upon Sunday, and the statement was filed and served the following day. Where the last day for

the performance of an act falls upon Sunday, it is excluded in the computation of time. Rem. & Bal. Code, § 252; *Rogers v. Trumbull*, 32 Wash. 211, 73 Pac. 381; *Bank of Shelton v. Willey*, 7 Wash. 535, 35 Pac. 411; *Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077. This court has held that the testimony may be certified in the narrative form, and that a certificate like the one in the case at bar meets the requirements of the statute. *Murray v. Shoudy*, 13 Wash. 33, 42 Pac. 631. The motion to dismiss is denied.

The record presents the following material facts: The deceased, an experienced miner, was thirty-five years of age, and on the morning of the day of his death, which occurred in the afternoon of August 8, 1905, was in good health. He and his minor son, twelve years of age, were working in a coal mine at Roslyn, called mine No. 2, in room 14, on the tenth level. At twelve o'clock they retired to the entry, or incline as it is called in the testimony, to eat their lunch, and returned to their work in room 14 about fifteen minutes later. When they had reached the gangway going to their lunch, they heard a blast or shot in room 10. As they returned to their work, they observed smoke coming from rooms 11 and 12 and in the gangway. The face of the coal in room 14 where they were working was 137 feet distant from the gangway, and there was no connecting crosscut from room 12. About a half hour after they returned to their work the boy became sick and dizzy, and his father directed him to go to a point near the gangway where they had left a bucket containing coffee, and get a drink. As he was returning, his father called to him for a drink, and the boy returned to get the coffee. The father fell about fifteen feet from the face of the coal where he had been working, before the boy could return to him, was taken out of the mine in an unconscious condition, and died about four hours later without having regained consciousness. He was proceeding toward the gangway when he fell. The evidence tends to

show that his death was caused by the inhalation of poisonous gases. He and the boy had worked in rooms 13 and 14 for about three months before the accident occurred. The foreman had directed the employees not to fire shots between shifts. The day shift was from 8 a. m. to 4:30 p. m. Notice to that effect was posted on the outside of the mine. The brattices or canvas curtains, which were hung from the roof across the gangway between rooms 13 and 14, were torn and defective. Their purpose was to deflect the air current from the gangway into and through the several rooms. It was the duty of the fire boss to see that they were kept in repair. The appended map will illustrate the working plan on the 10th level:


Location of Rooms on 10th Level with direction of Air Current
Raslyn No 2
10TH LEVEL WEST
HAULAGE ROAD
Gob
Rib
Face
Pillar
Room No 16
Room No 14
Room No 13
Room No 12
Room No 11
Room No 10
Room No 9
Approximate Line of Gob
MINE NO 2
72 Incline

What we have called the gangway is designated on the map as "Haulage Road" and "10th level." The coal cars are operated along this passageway. The brattices extend from the ceiling or roof of the mine to the floor of this passageway.

We think the record discloses at least two statutory breaches of duty upon the part of the respondent. The statute, Rem. & Bal. Code, § 7381, provides that the owner, agent or operator of every coal mine shall provide in the mine

"A good and sufficient amount of ventilation for such persons and animals as may be employed therein, the amount of air in circulation to be in no case less than one hundred cubic feet per minute for each man, boy, horse, or mule employed in said mine, and as much more as the inspector may direct, and said air must be made to circulate through the shafts, levels, stables and working places of each mine."

Section 7382 provides that

"No heading shall be driven more than sixty feet from the face of each chamber, breast or pillar, unless for the reason that he deem the same impracticable the inspector gives permission in writing to extend the distance beyond sixty feet."

Neither of these provisions was complied with. As we have pointed out, there is evidence from which it may be inferred that the air was not made to circulate through rooms 13 and 14. The brattices or curtains, designed to accomplish this purpose, were defective. The respondent argues that there is no evidence that the air was not properly deflected in and around rooms 13 and 14. It seems to us that the fact that the brattices were torn and defective, that one man lost his life, and that the boy became sick and remained sick and confined to his bed for some hours from inhaling poisonous gases, is most convincing evidence that the air was not made to circulate where they were working. It is said that there is no evidence that the respondent did not have written permission from the inspector to extend rooms 13 and 14 more than sixty feet from the gangway or level. The

fact that it was so extended, and that there were no cross-cuts, was however shown. If the respondent had the written permission to so extend the rooms, it has the burden upon it of showing that fact. *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819.

The provisions of the statute measure the respondent's duty. The legislature, in recognition of the hazards of working in coal mines, has made careful provisions for their inspection, and imposed imperative duties upon those who own and operate them. The purpose of the law is to provide a reasonably safe place for the men to work. A failure to observe these provisions is negligence *per se*. *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Whelan v. Washington Lumber Co.*, 41 Wash. 153, 83 Pac. 98, 111 Am. St. 1006; *Pachko v. Wilkeson Coal & Coke Co.*, 46 Wash. 422, 90 Pac. 486; *Sommer v. Carbon Hill Coal Co.*, 89 Fed. 54. As was said in the *Sommer* case, the law is, "in effect, the measure of that reasonable care which the owner or operator of a coal mine is required to take to avoid responsibility for injuries to workmen arising from accidents;" and the duty is a nondelegable one. The appellants have cited Laws of 1888, page 41, § 15, Pierce's Code § 6523. This section of the statute has not been carried into either Ballinger's Code or the Rem. & Bal. Code, and if not superseded by the Laws of 1891, page 152 *et seq.*, has no application to any act of negligence charged or proven in the case at bar. Its provisions are expressly limited to "violations of this act." The other provisions of the statute to which we have adverted are taken from later acts.

It is said that, if any negligence is shown, it is the negligence of a fellow servant, occasioned by the violations of a working rule promulgated by the respondent and known to all of its servants. There are two answers to this contention; (1) It is shown that the respondent was guilty of concurring acts of negligence. *Sipes v. Puget Sound Elec.*

R., 54 Wash. 47, 102 Pac. 1057; (2) That the rule of the company had been habitually violated for three months immediately preceding the death of the deceased. The evidence in support of the latter statement is as follows:

"Q. What was the practice or habit or were the men accustomed to shoot off blasts or shots during shifts while the men were at work? A. They were doing it at the noon hour. Q. How long had they done that? A. Well, since I had been there. Q. That you say was about three months? A. Yes, sir. Q. And where would they get their supply of powder for that purpose? A. They bring it every day. Q. The company supplied that? A. No, sir, they supplied their own powder. Q. They supplied their own powder; and that had been going on for three months? A. Yes, sir. Q. On your level—on the 10 level? A. Yes, sir."

"Evidence of the habitual violation of a rule with the knowledge of the employer is admissible to prove the abrogation of such rule. But evidence of a custom in violation of a rule will not be received unless it is shown that the custom has existed for such a length of time as to create a presumption of acquiescence therein by the defendant and knowledge thereof by the plaintiff." 6 Thompson, Commentaries on Law of Negligence, § 7773.

See, also, 1 Labatt, Master & Servant, pp. 516, 517, § 232; *Driver's Adm'r v. Southern R. Co.*, 103 Va. 650, 49 S. E. 1000.

Finally, it is contended that the deceased was guilty of contributory negligence which precludes a recovery. The argument is made that, because he resumed work at 12:15 o'clock and continued at work until about one o'clock, having heard the shot at 12 o'clock, and having seen the smoke a few minutes later, his conduct does not measure up to the standard of the average prudent man, and that his contributory negligence should be ruled against appellants as a matter of law. We have seen that he was trying to get to the gangway when overcome with gas. The mere fact that he remained at work a moment too long cannot, as a matter of law, bar a recovery. His conduct and his duty cannot be

measured with such nicety. *Pachko v. Wilkeson Coal & Coke Co.*, and *Hall. v. West & Slade Mill Co.*, *supra*. *Pugh v. Oregon Imp. Co.*, 14 Wash. 331, 44 Pac. 547, 689, and *Hughes v. Oregon Imp. Co.*, 20 Wash. 294, 55 Pac. 119, cited by the respondent, are not in point. In these cases the undisputed evidence showed that nearly a half hour elapsed between the time the men were notified of the fire in the mine, and to leave the mine, and the shutting down of the fan, and that all the miners could have gone out of the mine in less than half that time. The negligence relied upon in those cases was the shutting down of the fan by the superintendent of the mine. The cases cited by the respondent from other jurisdictions are so variant upon the facts that they are not in point, and a discussion of them would extend this opinion to an unreasonable length. The argument that the torn and defective brattices and the absence of crosscuts between rooms 12 and 13 were not the proximate cause of the death of the deceased, but that the proximate cause of his death was his own negligent conduct, presents questions of fact rather than law.

The judgment is reversed, with directions to grant a new trial.

Rudkin, C. J., Fullerton, Mount, and Parker, JJ., concur.

[No. 8908. Department One. December 19, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK PILEGGE, *Appellant*.[1]

CRIMINAL LAW—TRIAL—REOPENING CASE—DISCRETION. It is not an abuse of discretion to refuse the accused's request to reopen the case, where counsel for accused advisedly refused to offer any evidence and rested, and the witnesses for the state were excused and an adjournment taken until the next morning.

RAPE—FORCE—INTENT — EVIDENCE — SUFFICIENCY. There is sufficient evidence of an assault with intent to commit rape, without consent, with force sufficient to overcome resistance, where the assault was conceded and the attempt, force and resistance clearly shown by the evidence of the prosecutrix, and by her condition and bruises on her person immediately thereafter, the intent of the accused being for the jury as shown by his acts.

RAPE—ASSAULT AND INTENT — RESISTANCE — INSTRUCTIONS. In a prosecution for assault with intent to commit rape, by force, it is sufficient to instruct the jury that the act must have been by forcibly overcoming the resistance of the prosecutrix, without charging that she must have made all the resistance within her power.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered November 17, 1909, upon a trial and conviction of assault with intent to commit rape. Affirmed.

Gallagher, Smith & Mack, for appellant.

Fred C. Pugh and *Lucius G. Nash*, for respondent.

MOUNT, J.—The appellant was convicted of an assault with intent to commit the crime of rape. He appeals from the judgment pronounced thereon.

It appears that, after the state had introduced all its evidence and counsel for the appellant had called the appellant to the witness stand in his own behalf, the trial court requested counsel for the appellant to first make a statement of his defense to the jury. Counsel for the defense there-

[1]Reported in 112 Pac. 263.

upon declined to do so and, after a short consultation with the defendant, announced to the court that the defendant would rest his case and offer no testimony. This occurred in the afternoon, at about time for the usual adjournment. The trial court thereupon took a recess until the next morning. The witnesses for the state were excused from further attendance upon the court. The next morning counsel for the defendant requested permission to place the defendant upon the witness stand, to testify that he passed by the place where the crime was alleged to have been committed on the morning thereof, but did not stop. Counsel for the state objected to this, upon the ground that the case was finished the evening before; that he had excused his witnesses, and that one of his important witnesses whom he would need upon rebuttal had gone away and could not be had. Defendant's request was thereupon denied, and he argues now that the trial court abused its discretion in so ruling.

There are cases in which the courts have held that the fact that all the witnesses for one side have been excused after the case has been closed, is not sufficient ground for refusing a reopening. *Maddox v. State*, 68 Ga. 294. In *State v. Craemer*, 12 Wash. 217, 40 Pac. 944, this court said:

"If the record disclosed that there was in fact a person whose testimony could have been secured upon reasonable adjournment had, and that such testimony was material to appellant's case, we should not hesitate to say, considering the great importance of the issue, that the refusal of the court to grant a reasonable continuance would be error; . . ."

Those were cases, of course, where diligence had been used, and where defendant did not know of and could not call the witnesses in the regular and orderly conduct of the trial. In this case, however, no such condition arises. Here counsel for the defense had all of his witnesses, and he knew what the testimony would be on the evening before when he refused to offer any evidence. He did so advisedly. But after the state had excused its witnesses, he changed his mind and concluded

that he would offer the evidence stated. It was clearly within the discretion of the court at that time, under the circumstances stated, to refuse the request, and we think the denial was not such an abuse of discretion as would justify a reversal of the case.

Appellant next argues that the evidence is insufficient to sustain the verdict of the jury, because it was necessary for the state to show; (1) an assault; (2) an intention to have carnal knowledge of the prosecuting witness against her will; (3) without her consent; (4) with force; and (5) to overcome by such force as was necessary all resistance the prosecuting witness could make; and that none of these elements were shown except the assault. Conceding that all these elements are necessary to be shown, there is abundant evidence of each fact stated. The assault is conceded. The intention of the appellant in making the assault is shown by his acts, and it was for the jury to say what his intentions were. The evidence shows that the prosecuting witness lived in the country, about a mile distant from an interurban railway station; that this was a small waiting station for passengers, open on one side, with no one in charge; that on October 26, 1909, she walked from her home to the station, where she intended to take the train for Spokane; that she arrived at the station about 9:30 in the morning; that the train was due at about 9:39; that she was the only occupant of the station; that while she was there the appellant came up and made some remark to her about the time the train would be along; that while she was standing looking at the time card, he grabbed her and threw her to the floor and fell upon her; that she struggled and resisted the assault, but nevertheless he succeeded in holding her down and pulling her clothes up to her hips, and then discovered that she had on closed drawers, when he desisted, got up, and went away; that his trousers were unbuttoned. She testified that her hands were free a part of the time, and that she did not strike him or scratch him, and that she did not kick him. The wit-

ness Jamieson heard the scuffling and shouting, and came up to the scene immediately thereafter and saw the appellant as he went away. The train came along three or four minutes later. Passengers on the train arrested the appellant. The arms and back of the prosecuting witness were badly bruised, she was bitten on the face, her hair was disheveled, and her clothes were covered with dust from the floor.

After reading the evidence, no reasonable man can doubt what the appellant's intention was when the assault was made. All the elements above stated were either directly proved or follow as a matter of course from the acts of the appellant. Even if the prosecuting witness did not strike, scratch, and kick her assailant, if she could have done so, there was ample evidence to show that the assault was made by force, against her will, and with intent to overcome all resistance. The reason why he did not finally accomplish his purpose is evident.

It is also argued by the appellant that the court erred in giving instructions to the jury. These instructions clearly and concisely and fully covered the case. The appellant's counsel is apparently sincere in arguing that the court should have instructed the jury to the effect that, before a conviction could be had, they must find that the accused intended to overcome all resistance that the prosecuting witness could make, *and that she must make all the resistance within her power*. We shall therefore notice this contention briefly. The court instructed the jury as follows:

"Such assault must have been committed by said Pilegge upon said Laura Newlon with the intent at the time of making same to feloniously commit an act of sexual intercourse with said Laura Newlon, against her will and without her consent, by forcibly overcoming her resistance."

This was the correct rule. It is stated in substance, and the reasons therefor given, in *State v. Shields*, 45 Conn. 256, as follows:

"The defendant requested the court to charge the jury that to constitute the crime of rape it was necessary that the

prosecutrix should have manifested the utmost reluctance and should have made the utmost resistance. The court did not comply with this request, and the refusal to do so is made a ground for asking a new trial. While it may be expected in such cases from the nature of the crime that the utmost reluctance would be manifested, and the utmost resistance made which the circumstances of a particular case would allow, still, to hold as matter of law that such manifestation and resistance are essential to the existence of the crime, so that the crime could not be committed if they were wanting, would be going farther than any well-considered case in criminal law has hitherto gone. Such manifestation and resistance may have been prevented by terror caused by threats of instant death, or by the exhibition of brutal force which made resistance utterly useless; and other causes may have prevented such extreme opposition and resistance as the request makes essential. The importance of resistance is simply to show two elements in the crime—carnal knowledge by force by one of the parties, and non-consent thereto by the other. These are essential elements, and the jury must be fully satisfied of their existence in every case by the resistance of the complainant, if she had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force. So far resistance by the complainant is important and necessary; but to make the crime hinge on the uttermost exertion the woman was physically capable of making, would be a reproach to the law as well as to common sense. Such a test it would be exceedingly difficult, if not impossible, to apply in a given case. A complainant may have exerted herself to the uttermost limit of her strength, and may have continued to do so till the crime was consummated. Still, a jury, sitting coolly in deliberation upon the transaction, could not possibly determine whether or not the limit of her strength had been reached. They could never ascertain to any degree of certainty what effect the excitement and terror may have had upon her physical system."

This reasoning is sound and disposes of the contention that the complaining witness must make all the resistance within her power.

There is no merit in any of the other assignments of error. The judgment must therefore be affirmed.

RUDKIN, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9023. Department Two. December 20, 1910.]

LOUISE CATHERINE HECKERT, *Appellant*, v. F. W. HILSCHER, *Respondent*.[1]

BILLS AND NOTES—MATURITY—INSTALLMENTS DUE—OPTION—TIME FOR EXERCISING. An option to declare the principal of a note due for default in the payment of interest, time not being made of the essence of the contract, cannot be exercised after the default is purged by payment of the interest to the depositary appointed to collect and receive the payments.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 4, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Merritt, Oswald & Merritt, for appellant.

W. H. Plummer, for respondent.

PER CURIAM.—The parties to this appeal were formerly husband and wife. In severing their matrimonial relations they had a property settlement. Respondent executed a promissory note for the sum of $8,000, drawing a rate of interest equal to the sum of $75 per month until March 1, 1911, and thereafter at the rate of nine per cent per annum. It was provided in the note that the interest should "be paid on the first day of each and every month, and if not paid on or before the expiration of ninety days from said first day, the whole sum of both principal and interest to become due and collectible at the option of the holder of this note," etc. At

[1]Reported in 112 Pac. 365.

the same time the parties made the Union Trust Company of Spokane a depositary to hold the note and the collateral which was deposited to secure its payment, under a contract in writing which provided:

"Should, however, the said second party fail in behalf of his obligations in respect to said note, and should the said party of the first part under the terms of this agreement become entitled to receive said stock, or to enforce payment of said note in any way, then and thereupon the trust company shall hold said stock and said note subject to such legal action, if any, as the first party may elect to take."

Respondent did not make the November, 1909, payment, as provided in the note, and had not done so on the first day of February, 1910. On the second day of February, this action was begun, and on the same day the respondent paid the $75 into the trust company.

The case turned below, and must turn here, on a question of fact, Was the payment made before the action was begun by the service of the complaint and summons? The testimony is conflicting, and a review of it would serve no useful purpose. We are content to follow the trial judge, who found that the burden of proof had not been sustained by appellant. It is earnestly contended by the appellant that in law a payment after the expiration of the ninety-day period would not relieve respondent of the consequences of his default, and that a forfeiture would result, because, under the terms of the escrow agreement, the trust company could not accept the payment and bind appellant. Reliance is put upon that part of the contract quoted above, but it seems to us that appellant could not declare a forfeiture of the contract without some affirmative act or declaration manifesting her intention or option to do so in some way provided in the contract or recognized by the law. *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736. Mindful of this rule, she attempted to meet it by beginning her action, but the court found respondent had purged himself of his default at the time the action was begun. Time is not made the essence of the contract. The option to

defer payments if granted upon sufficient consideration is a valuable right, and cannot be taken away unless it clearly appears that the intention of the moving party to declare the default or invoke the penalty has been exercised within time.

Judgment affirmed.

[No. 9028. Department Two. December 20, 1910.]

NORTH COAST RAILROAD COMPANY, *Respondent*, v. W. J. AUMILLER *et al.*, *Appellants*.[1]

EMINENT DOMAIN—STATUTES—CONSTRUCTION. The statutes of eminent domain are to be strictly construed.

SAME—JUDGMENT ON AWARD — TIME FOR ENTRY — ABANDONMENT. After an award of damages in eminent domain, judgment need not be entered immediately, but the petitioner has a reasonable time within which to elect whether to abandon the proceedings or appropriate the property.

SAME—COMPENSATION—AWARD—INTEREST. Under Const., art. 1, § 16, requiring full compensation for private property condemned, the award of damages in eminent domain proceedings draws interest from the date of the rendition of the verdict to the time of entry of the judgment, where the owners, remaining in possession of the premises, received no rents or profits and were unable to rent the property because of the award.

Appeal by defendants from a judgment of the superior court for Yakima county, Preble, J., entered June 17, 1910, upon the verdict of a jury awarding damages in proceedings to condemn property for a railroad right of way. Reversed.

James O. Cull, for appellants.

Danson & Williams and *H. J. Snively*, for respondent.

DUNBAR, J.—This action was brought by the respondent, a railroad company, under the eminent domain statutes, to appropriate certain property of the appellants for a right of way. An order of necessity was adjudged, and the case

[1]Reported in 112 Pac. 384.

was tried to a jury on the question of damages sustained by the appellants, which resulted in a verdict in their favor in the sum of $15,000. This verdict was entered on the 13th day of May, 1910. On the 17th day of June, 1910, respondent applied to the court for the entry of judgment and final decree of condemnation, which was obtained and entered. This judgment did not provide for the payment to appellants of interest on the amount of the award from the date of entry of verdict to the date of payment of judgment, and it is upon this refusal of the court to enter judgment for that amount that this appeal is taken, and the only question involved is whether a landowner, in case of appropriation of his property by a railway corporation under the power of eminent domain, is entitled to interest on the amount of damages awarded by the jury from the date of the award or entry of verdict until the final judgment of appropriation.

Section 16, art. 1, of the constitution of the state of Washington, provides, among other things, that no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner. It is well established that the powers of eminent domain are to be strictly construed, and that parties seeking it must not be allowed to encroach upon the individual rights beyond the scope of their authority; so that this question will be considered with reference to constitutional guaranty that full compensation must be paid into court for the owner. There is no requirement that the appropriator of the property shall cause judgment to be entered immediately upon the verdict assessing the damages, and under the rule announced by this court in *Port Angeles Pacific R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305, the condemning party has a right to a reasonable time in which to make the election whether it will abandon the proceedings or appropriate the property. In *Port Angeles Southern Co. v. Barbare*, 46 Wash. 275, 89 Pac. 710, it was held that a corporation had a reasonable

time to make its decision in this regard. Conceding this right, the least that it can do in good conscience is to give the owner the benefit of the value of the award while it is taking time to determine whether or not it will abide by the award. It having the advantage of an opportunity to retrace its steps while the other party is irrevocably bound by the award, we think that this is, at least, all the advantage which should be accorded it, and that the property owner should not be forced to bear a loss by reason of the transaction.

In this particular case the amount in controversy is small, but the principle to be established might become important in other cases. In this case it is conceded that the owners remained in possession of the property, but it is also a fact that they offered to prove that they had received no rents, issues, and profits from said property subsequent to the award, and that they had been unable to rent the same because of the claim thereto of the petitioner in virtue of these proceedings. If this be true, and it must be taken to be true, then it would seem that, not having the real benefit of the land and not having the right to the use of the award, there could be no question that full compensation was not obtained by them. The award of damages is somewhat in the nature of a judgment. In fact, it was held to be an interest-bearing judgment, by this court, in *State ex rel, Donofrio v. Humes*, 34 Wash. 347, 75 Pac. 848. It is true, as urged by the respondent, that there might be said to be three separate and distinct judgments recognized in our eminent domain proceedings: adjudication of the necessity of the appropriation, judgment on the verdict or award of damages, and judgment or decree of appropriation. The first, of course, simply establishes an antecedent right to commence the proceedings. The last is only the formal announcement which necessarily follows, and gives legal effect to, the real judgment, which embodies and decides the real controversy between the parties, viz., the amount which is to be paid.

But, whatever may be said of these more or less technical questions, the vital question is, what constitutes full compensation. Conceding that the possession remains in the landowner, it cannot be said with any degree of reason that the value of his possession is not impaired by the judgment of damages. Possession is only one of the elements of value in land. The right to rent, the right to sell, the right to improve, are all valuable rights which must in the nature of things be affected by this relation. If so, it conclusively follows that he has not received full compensation. As said by the court in *Lake Koen Navigation Res. & Irr. Co. v. McLain Land & Inv. Co.*, 69 Kan. 339, 76 Pac. 853:

"In condemnation appeals the issue is, what shall be full compensation? Interest is allowed merely as a means of securing such compensation. If, upon the condemnation of land, complete deprivation do not follow at once, still, further tenure is rendered precarious. Possession may be disturbed at any time, and all property rights are exercisable only under doubt and uncertainty as to their duration. If as a recompense for the loss attending this embarrassed use of the land, and this qualification of dominion over it pending the payment of the condemnation money, interest may be allowed."

Lewis on Eminent Domain, § 742 is as follows:

"Where damages are assessed for property to be afterwards taken, the award or verdict should include interest from the time with reference to which the damages are estimated, to be reduced by the value of the use of the property to the owner while he continues to have such use. As we have before observed, the estimating and payment of the compensation should be concurrent with the taking. As this is impossible in practice, a time must be selected with reference to which the compensation shall be assessed and to which the title will relate when the compensation is paid. This point of time must necessarily be before the compensation can be paid. Between that time and the payment the owner has only a qualified use of his property. He may use it as it is, but he cannot improve or sell it except subject to rights acquired by the condemnation. As his just compensation is withheld

from him, though necessarily, he should have an equivalent for such withholding, and that, in law, is legal interest."

In further discussing the question, it is said:

"It is true that, until the company actually takes possession, at the end of the proceedings, the owner has the legal right to possess and use the land. It cannot be assumed that the value of this legal right is equivalent to the interest on the assessed value of the land. From the time of the award, he is practically deprived of his right to dispose of the land. His possession is precarious, liable to be terminated at any time; he cannot safely rent, he cannot safely improve, if he sows he cannot be sure that he will reap. As he is not placed in this position by any act of his own, is not in as a wrongdoer, nor under any contract, there would be no justice in charging him with any assumed value of the use. Where the owner has actually derived benefit and value from his possession and use between the filing of the award and the assessment by the jury, the value of such possession and use may be ascertained by the jury and the amount of it deducted from the interest allowed."

This is also the rule laid down by Randolph on Eminent Domain, § 280, where it is said:

"Where the landowner is left in possession for a time after the date of valuation, the possession has been deemed equivalent to interest. In other decisions possession is not deemed equivalent to interest, as it is permissive only, and does not carry the right to improve the property save at the possessor's risk. The best rule is that which does not arbitrarily make possession equivalent to interest, but allows interest from the date of valuation, and reduces the amount by the estimated value of the possession."

And without further citation, the overwhelming weight of authority is to this effect. It is also to the effect that, inasmuch as the landowner has nothing to do but to receive full compensation before his land shall be taken, the question of whether the possession has been equal to interest on the award is a fact to be established affirmatively by the condemning party.

Under this rule, the judgment in this case will be reversed, and the court instructed to enter judgment for the additional interest demanded.

RUDKIN, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9155. Department Two. December 20, 1910.]

H. J. BURNS, *Respondent*, v. BRADFORD-KENNEDY LUMBER COMPANY, *Appellant*.[1]

FRAUDS, STATUTE OF—PROMISE ON DEBT OF ANOTHER—ORIGINAL PROMISE. A foreign corporation is liable for the purchase price of machinery, as upon an original oral promise, and the transaction is not within the statute of frauds, where its agent told plaintiff he had a job for him, and a week later came to plaintiff and gave the measurements for a blow pipe system to be installed in the mill of another company, ordered the goods, and on plaintiff's objection that such company did not have good financial standing, directed plaintiff to send the bill to such company and "we will pay the bill," it appearing that the leading object of the defendant company in installing the system was to enable the mill to fill defendant's orders for lumber.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 7, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Poindexter & Moore and *Richard G. Hutchinson*, for appellant.

Barker & Barker and *C. C. Upton*, for respondent.

DUNBAR, J.—The respondent is a resident of the city of Spokane, in the business of manufacturing blow pipes and attachments for sawmills in Spokane. The Dehlbom Lumber Company, at the time of the transaction out of which this suit grows, was engaged in the manufacture of lumber prod-

[1]Reported in 112 Pac. 359.

ucts in the state of Idaho. The appellant is a Nebraska corporation, having an office in the city of Spokane, engaged in buying and selling lumber, and one George P. Newmeyer was its agent. Newmeyer, according to his statement, went to respondent's factory and gave him the measurements for a blow pipe system to be installed in the Dehlbom mill, which it is conceded was of doubtful financial standing. According to the respondent's statement, Newmeyer met respondent in the city of Spokane and told him that he thought he would have a job for him. About a week later he went to respondent's place of business, and gave him the measurements for a blow pipe system to be installed in the Dehlbom mill. Respondent told Newmeyer that the Dehlbom company did not have good financial standing, and Newmeyer, without being requested by respondent, said, "Well, you send the statement on to them, and we will pay the bill." Newmeyer denies that he ever told respondent that appellant would ever pay the bill for the blow pipe system. The system was manufactured and installed in the lumber company's mill. The appellant refusing to pay for the same, this action was brought, and in answer to the complaint, the appellant denied that it had ordered the said system, or had agreed to pay for the same. The case was tried to the court without a jury, and judgment was rendered against the appellant in the sum of $348.64, with costs. From that judgment, this appeal is taken.

There is no controversy over the value of the goods furnished. The findings of fact were made by the lower court, all of which were excepted to by the appellant, the main and material one being that, on or about August 21, 1909, defendant, through its agent George P. Newmeyer, ordered of plaintiff a certain blow pipe system, to be shipped and installed in a certain sawmill at Copeland, Idaho, operated by the Dehlbom Lumber Company. Two questions are presented by the appeal in this case: (1) Was the promise of Newmeyer, if he did in fact promise, an original promise and valid and binding though oral, or was it a promise to answer for the

debt of a third person, which, to be valid, would have to be in writing; and (2) was the purchase of machinery within either the actual or apparent scope of Newmeyer's authority as agent of appellant.

We think there is no question but that the second query must be answered in the affirmative. As to the first, our code provides, § 5289, Rem. & Bal., that "every special promise to answer for the debt, default, or misdoings of another person" shall be void unless it is in writing. It is the contention of the appellant that the circumstances of this case bring it within the prohibition of the statute, and many cases are cited to sustain the general doctrine that, where one agrees to pay for goods that are furnished to another, or where one says to the merchant, "Let Mr. Blank have what goods he wants and I will pay for them, or I will see that they are paid for," such promise falls within the statute. But all of these cases, where the contract on the part of the avowing party embraces the expression, "we will see that the account is paid," or words to that effect, are easily distinguishable from the case at bar. In those cases the contract is generally made by one party, and the other party vouches for the payment of the bill. But in this case, if the testimony of the plaintiff is true—and we have no reason to think that the court erred in finding in effect that it was—there was but one party who dealt with the plaintiff in this transaction, viz., Newmeyer. It was he who, meeting the respondent prior to the transaction, told him that he would have a job for him. It was he who, a week later, went to his place of business and ordered the goods, and gave the measurements of the mill, and arranged for the shipping and installing of the system. Under such circumstances, defendant would have been liable as an original purchaser even without any express promise to pay. It is true, Newmeyer was ordering it sent to another party or company, and it is also true that, in connection with his promise to pay, he directed respondent to send the bill to the lumber company. But this might well have been for the

purpose of keeping their accounts straight with the lumber company, or even with the hope that the lumber company would pay the bill. These were matters between the defendant and the lumber company, with which the respondent had no concern. The testimony shows that the appellant had transactions with the lumber company in which the lumber company was to furnish lumber to the appellant, and that it became necessary for appellant's own benefit to have this system installed in the lumber company's mill. An excerpt from the testimony of the respondent is as follows:

"Q. You said that Mr. Newmeyer told you something about the Dehlbom people being slow or skeptical? A. It seems they had lost confidence in their credit or something. Q. That was in connection with installing the blow pipe system? A. Yes, sir; and other equipment they wanted around there. It was not altogether on this. Q. What further did he say, if anything, in regard to putting in this system at that time? A. He was to put it in; that they had to have that put in in order to get their lumber out. He said they had been monkeying along all spring up to this time and that they had not got it out; that their orders were piling in on them and they could not get their orders out on time without this being put in, and he took it into his own hands to have it put in."

So that it appears from the respondent's testimony, which we have indicated bears the impress of truth, that the appellant's agent, on his own initiative, proposed to get the respondent this job; that he went up to Idaho for the purpose of seeing about the installation of the system and of obtaining the measurements; that when he came back, he went to the respondent and gave him the measurements with specific instructions to have it taken up to Idaho and installed; that he asked respondent what the cost of the work and material would be; that the respondent told him that, if they had to stop to figure, it would delay the execution of the work some, and that the agent did not wish the delay and ordered them to proceed at once with the work, which was done.

There is probably no branch of the law that has furnished the courts with as many cases as the statute of frauds, and the distinctions drawn by the courts have frequently been exceedingly shadowy. The circumstances in each case are a little different from the circumstances in other cases, so that it is difficult to lay down a controlling rule, or to determine what state of facts constitutes a promise to answer for the debt of another. Of course, if the facts show that the promise is collateral, the statute is invaded if the promise is not in writing. Chief Justice Shaw, in *Nelson v. Boynton*, 3 Met. (Mass.) 396, 37 Am. Dec. 148, announces the rule as follows: In case one says to another, "Deliver goods to A. and I will pay you," it is binding, though by parol, because A., though he receives the goods, is never liable to pay for them. But if he says, "I will see you paid," or "I will pay if he does not," or uses equivalent words showing that the debt is in the first instance the debt of A., the undertaking is collateral and not valid unless in writing. There is also another rule which is well established, viz., that where the leading object of the promissor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute. As we interpret the testimony in this case, the obligation is binding on the appellant, and the judgment is therefore affirmed.

RUDKIN, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9055. Department Two. December 20, 1910.]

MICHAEL BUDMAN, *Appellant*, v. SEATTLE ELECTRIC COMPANY, *Respondent*.[1]

MASTER AND SERVANT—INJURIES TO SERVANT—WARNING—QUESTION FOR JURY. There is a question for the jury, where a shoveler, struck while working on a street car track, testified that no gong was sounded giving him notice of the approach of a car, while the motorman and another witness testified that the gong was sounded.

SAME — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. A common laborer at work shoveling gravel on a street car track is not guilty of contributory negligence in not noticing the approach of a street car, where no warning was given according to custom, and he was on the track in the line of his duty and did not see or hear the car.

SAME—CAUSE OF ACCIDENT—EVIDENCE—QUESTION FOR JURY. Where a man has been forcibly knocked down by a street car, it cannot be said, as a matter of law, that the position in which he was found made it physically impossible that he was struck in any particular way; the question being for the jury.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 25, 1910, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a track laborer struck by a street car. Reversed.

Jay C. Allen, for appellant.

James B. Howe and *H. S. Elliott*, for respondent.

DUNBAR, J.—The Seattle Electric Company was operating its cars in Seattle on a line that is known as the Wallingford line. Some gravel and sand had been thrown upon the track where this accident occurred, for the purpose of repairing or raising the ties. The most of this gravel which had not been used had been removed. There was still a little left to be removed, and the plaintiff was left by the foreman to remove it, when one of the cars traveling on that line struck

[1]Reported in 112 Pac. 356.

him, causing the injury for which he sues to recover. The case was tried to a jury, and resulted in a verdict in favor of the plaintiff, upon which defendant moved for judgment notwithstanding the verdict, which motion was sustained. Judgment was rendered accordingly, and from such judgment this appeal followed.

The plaintiff was a foreigner, fifty-nine years of age and a common laborer, and had been in the employ of the defendant company about a month. According to his testimony, he was working at the time on the track, and his work required him to be in a stooping position. While in such position, the car struck him without any notification of its approach. He testified that all the cars that had come down the track prior to the one that hurt him had rung a bell, thereby notifying him of their approach, but that this one did not; that it was a double track, and that there was another car that had just passed on the other track which he had noticed; that he did not hear the car approach which hurt him, and he had no notification in any way of its approach; that if he had been notified of the approach of the car, or had seen it, he would have run and escaped it.

The motorman testified that he saw the plaintiff approaching the track with his shovel when he was about two car lengths from him; that he threw off the current to let the car drift until he could see whether the plaintiff was going to cross the track; that when the plaintiff got within about three or four feet of the track, he stopped perfectly still, set his shovel down on the ground, with his right hand on the top of the handle of the shovel, and looked straight down at the ground; that he was ringing the gong at the time for the purpose of attracting his attention, and he supposed that the plaintiff knew that the car was coming; that he let the car coast right on up, and did not know anything more about it until he heard something which sounded as though something fell against the car "like it was a piece of wood." Then, he says he made an application of the air and stopped the

car, stepped over to the side of the window, and looked out, and saw the man lying down there in the street. So that it will be seen that as to whether notification was given by the sounding of the gong or ringing of the bell was a question upon which there was direct conflict of testimony. There was another witness who testified that he heard the motorman ringing the bell. The conductor on the train at the time, while not directly testifying that no gong was rung, impliedly testified so by stating that, when he heard this collision, he touched the bell for the purpose of notifying the motorman to stop the car, as he did not know that there was any effort to stop it.

The record, excluding that portion which treats of the character of the injury, is meager, and we have examined it with care, and have been forced to the conclusion that, on the question of the negligence of the motorman in running the car onto the appellant, the testimony is so conflicting that it should have been submitted to a jury. If respondent was negligent, it was because it failed to perform a legal duty in this case—a duty owing to the appellant by reason of their mutual relations, or by the doing of something which it should not have done. The respondent cites many cases to sustain its contention that the testimony shows negligence on the part of the appellant as a matter of law; among them *Skinner v. Tacoma R. & Power Co.*, 46 Wash. 122, 89 Pac. 488; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657; *Helliesen v. Seattle Electric Co.*, 56 Wash. 278, 105 Pac. 458, and *Mey v. Seattle Electric Co.*, 47 Wash. 497, 92 Pac. 283, all cases, of course, which were decided by this court.

The case of *Skinner v. Tacoma R. & P. Co.*, *supra*, decided that a person was guilty of contributory negligence as a matter of law when, on a dark night, he stepped in front of an approaching street car, ten feet away, with its headlight burning, and running near the speed limit, where he knew that the cars were accustomed to meet, and where the approaching car was in open view for a considerable distance.

In that case it will be observed that the controversy was between a pedestrian and the street car company; while, in the case at bar, it is between the street car company and an employee, who was ordered into the position which he occupied by the company, and who was in that particular place in the performance of his duty; an entirely different proposition from the case of a pedestrian who, as a matter of course, must exercise his own judgment in relation to dangers which may beset him when crossing the car lines. In *Mey v. Seattle Electric Co., supra*, we held that a pedestrian was guilty of contributory negligence precluding a recovery, where he walked on a street car track, in a city where cars were constantly passing, at a point where the sidewalk and a part of the street were fenced off or taken up with building operations, where there was room every few feet for him to get off the track to allow a car to pass, and he failed to keep on the lookout for cars coming up behind him. In that case it was said:

"It also appears from uncontradicted testimony that there was a passage, a portion of the way between the fencing which inclosed the sidewalk and the car line and where the debris was piled, that was wide enough to allow pedestrians to pursue their way and the street cars to pass without injuring them, and that a portion of the way there was not room; and that also at the point where the plaintiff was injured there was room between a carriage or hotel bus and the railroad track for a man to pass without being injured. This being true, it seems plain that it was the duty of the appellant, while traveling in close proximity to this track in a place where he testifies he knew that cars were passing at short intervals, to have exercised the ordinary caution of noticing, when he passed those points where there was not room for both man and car, whether there was any car which was liable to injure him."

We hardly see how the doctrine announced in this case, where the cars had no notification of the presence of a pedestrian on their track, where there was no duty owing to the

pedestrian excepting to travel within the time prescribed by the law, to keep the ordinary look out and to protect the pedestrian after he was discovered upon the track if possible, but where the duty was upon the pedestrian to keep off of the track at the place where he was injured and where he had an opportunity to keep off of it and still pursue his journey, can have any application to the facts of this case. The other two cases cited announced the same principles. In discussing the case of *Helliesen v. Seattle Electric Co., supra,* it was said:

"We cannot understand how one looking for a car can fail to see a lighted car with its headlight thrown on the track ahead of it, and only forty-two feet away."

In this case the testimony of the appellant was to the effect that he was not looking for the approach of this car, for the reason that the custom had been to notify him when the car approached; that if he had to be constantly looking out for the car, he would not have been able to do much work. In the fourth case, we decided that a pedestrian who was run down by a team at a street crossing was guilty of contributory negligence as a matter of law, where it appeared that he held an umbrella over his head in such a position as to prevent him seeing the approaching team, and where if he had looked around he could have seen the team. The case, it seems to us, is not in point under the circumstances shown in this case.

The case of *Quinn v. Boston Elevated R. Co.*, 188 Mass. 473, 74 N. E. 687, which, as is stated by the respondent in its brief, was quoted with approval by this court in the case of *Helliesen v. Seattle Electric Co., supra,* was where the plaintiff was not in the employ of the railway company at all, but in another employment, and was engaged in patching the floor of Harvard Bridge. He was stooping down and marking a plank, when the running board of the car struck him in the face. There is no showing in that case that there was any duty on the part of the railway company to notify him, or that there was any knowledge on its part that he would be at

the place where he was hurt when the train passed such place. In closing the opinion of that case, the court said:

"On the uncontradicted evidence, we are of opinion that the judge was right in directing a verdict for the defendant. The plaintiff was working in a dangerous place, and was looking out for himself. He knew the danger of being too near the rail, for he testified that he was struck by a car near the same place five years before."

Eddy v. Cedar Rapids & M. C. R. Co., 98 Iowa 626, 67 N. W. 676, was a case where plaintiff was working on a street, and he had placed a plank on the top of some crossing sleepers to level them, when he pushed one out so far that the car knocked the plank against him and injured him. But even in that case the judgment was reversed on account of errors in the instructions given by the court in taking away from the jury questions which ought to have been submitted to them. The court, speaking of the instruction, said:

"There is no ground upon which this instruction can be sustained. It was a question of fact for the jury to determine, whether, under all the evidence, the motorman was negligent in not giving the signal, if it was found he failed to do so."

But, in any event, the plaintiff in that case had no relations with the railway company, and they had nothing more than the ordinary duties to perform towards each other. The case of *Stenzhorn v. City Electric R. C.*, 159 Mich. 82, 123 N. W. 621, was where a street sweeper was injured and, for the reasons announced in the other case, it was held that it was his duty, as a matter of law, to notice when he got close enough to the track to be in danger. And so with all the other cases cited.

In the early case of *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799, where the question of contributory negligence had been taken from the jury and decided by the court, this court said, speaking through Judge Anders:

"Generally, the question of contributory negligence is for the jury to determine from all the facts and circumstances of

the particular case, and it is only in rare cases that the court is justified in withdrawing it from the jury;" citing very many cases to sustain the announcement. It further said:

"There are two classes of cases in which the question of negligence may be determined by the court as a conclusion of law, but we think the case in hand does not fall within either of them. The first is where the circumstances of the cases are such that the standard of duty is fixed, and the measure of duty defined, by law, and is the same under all circumstances. . . . And the second is where the facts are undisputed, and but one reasonable inference can be drawn from them;" citing Cooley on Torts, p. 670, and 2 Thompson on Negligence, § 1236.

These principles of law have been adhered to by this court since their announcement in that case, and were reaffirmed, especially in the case of *Burian v. Seattle Electric Co.*, 26 Wash. 606, 67 Pac. 214, where it was held that, in an action to recover for damages resulting from being run down by a cable car, where there was some evidence that no gong was rung, it was error to nonsuit plaintiff, since it became the duty of the jury to determine what the fact was as to sounding the gong, and whether a failure to sound it constituted negligence under all the facts of the case. There it was said:

"Under our system of jurisprudence the jury is constituted the functionary which must pass upon these questions of fact. It is not a question of what may be our individual opinions as to the facts shown by the record. The law casts that duty upon the jury as a distinct and auxiliary branch of the court, and unless the evidence shows negligence on the part of appellant as a matter of law, it is his right to have the facts submitted to a jury. This court has held that generally the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and that it is only in rare cases that the court is justified in withdrawing it from the jury."

In this case the testimony was conflicting. The plaintiff was at his post of duty on the track, and if the jury believed

his testimony and not the testimony of the defendant in relation to a notice which was or was not given him, they would be justified in deciding that the motorman was guilty of negligence. We are not prepared to say from the testimony of the motorman alone that the jury would not have been justified in concluding that the motorman had wilfully committed this injury upon the plaintiff after having been notified of his presence on the track. It will be conceded, of course, that he had no right to run the plaintiff down even though he were guilty of contributory negligence in being upon the track where he had no business to be. It is true that a very alert and intelligent man might not have been willing to rely upon the notice which the plaintiff claims that he was to receive by the ringing of the bell and the sounding of the gong when the car approached; but it is a matter of common knowledge that men possessing the brightest and most alert minds, or even minds of ordinary alertness, are not found in employments of this kind, and they must be tested with reference to the character of mind possessed by men engaged in such employment.

There is also a claim that the position in which the plaintiff was found after he was knocked down shows that it was physically impossible for him to have been struck by the car in the manner in which he says he was struck. But the question of whether it was a physical impossibility under all the circumstances was a question to be determined by the jury. The facts being admitted, it is for the court, of course, to determine whether the acts shown constituted contributory negligence. But they were not admitted in this case, and were the subject of the controversy. It might be possible for a case to be presented where the facts would show conclusively that the claim of an individual was a physical impossibility. But such cases are rare, and where an accident has occurred that nobody was an eyewitness to, the mere fact that a man is found lying in a certain position is not conclusive that he was not struck in any particular way. When forcibly struck, the body

of a man is liable to be thrown or hurled or twisted so that he might alight in almost any conceivable shape; and in this case we think it was plainly for the jury to determine whether the claim of the plaintiff was physically impossible. For this reason, we think the court erred in granting the motion for judgment notwithstanding the verdict.

The judgment will be reversed, and the case remanded with instructions to pass upon the motion for a new trial, on grounds other than the ones discussed in this opinion; and, if said motion is denied, to enter judgment in accordance with the verdict.

Rudkin, C. J., and Crow, J., concur.

[No. 8855. Department One. December 21, 1910.]

W. D. Ingalls *et al.*, *Appellants*, v. George W. Eastman, *Respondent*.[1]

Highways—Obstruction—Special Damages. The obstruction of a highway may be enjoined by one who suffers a special damage in that he uses the highway at least twice a day to go from his residence to another tract which he was farming, and the obstruction required him to use another road with worse grades and twice the distance.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered December 8, 1909, upon sustaining a demurrer to the complaint, dismissing an action to enjoin the obstruction of a highway and for damages. Reversed.

Frank A. Luse, for appellants.

Gose, J.—The plaintiffs are the owners of a part of the northwest quarter of the northeast quarter of section 28, and of the northwest quarter of the northwest quarter of section

[1]Reported in 112 Pac. 372.

34, township 13, N. R. 18, E., in Yakima county. They reside upon the former tract, and farm both pieces of land. There is a public highway leading directly from their residence to their land in section 34. About six months before the commencement of the action, the defendant obstructed the highway by building a wire fence across it. In addition to the facts stated, the complaint alleges that the defendant will continue to maintain the obstruction unless required to abate it by a judicial order; that the plaintiffs go from their home to the land in section 34 at least twice each day; that they have made more than three hundred round trips since the creation of the obstruction; that owing to the obstruction they have been compelled to travel about twice the distance upon each trip, and that the closed highway has the better grade. A demurrer was interposed to the complaint, raising two questions: (1) that the complaint does not state facts sufficient to constitute a cause of action, and (2) that the court has no jurisdiction of the subject-matter or the parties. From a judgment sustaining the demurrer and dismissing the action, the plaintiffs have appealed.

It is apparent that the appellants suffer a special damage beyond that suffered by the general public, and that their property is injuriously affected and their personal enjoyment lessened within the meaning of the statute. See Rem. & Bal. Code, §§ 943, 944, and 8316. The question presented by the demurrer has recently received careful consideration by this court. *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 105 Pac. 632. Under the view there announced, the complaint states a cause of action. No brief has been filed on behalf of the respondent. The court had jurisdiction of the subject-matter and the parties, and erred in sustaining the demurrer. The order sustaining the demurrer was entered before the opinion in the *Sholin* case was filed.

The judgment is reversed for further proceedings.

Rudkin, C. J., Fullerton, Mount, and Parker, JJ., concur.

[No. 9105. Department One. December 21, 1910.]

Carrie Mayer *et al.*, *Appellants*, v. Mike Jacob, *Respondent*.[1]

Trusts—Resulting Trusts — Evidence — Sufficiency. The evidence establishes a trust in lands purchased, where the more reliable and preponderance of the testimony shows that the plaintiffs and defendant agreed to buy the land in equal shares, one of the plaintiffs paid the $500 earnest money, and the contract was taken in the name of the defendant, who almost immediately thereafter repudiated the contract, claiming that the money was a loan to him, it appearing that the parties were related and intimately acquainted, and that defendant's testimony is lacking in candor.

Appeal from a judgment of the superior court for Clarke county, McMaster, J., entered April 7, 1910, upon findings in favor of the defendant, in an action to establish a trust in real property. Reversed.

Miller & Crass, for appellants.

Bauer & Greene and *Jas. P. Stapleton*, for respondent.

Gose, J.—The complaint in this case alleges that the respondent holds title to an undivided two-thirds of lot 8, block 9, in the city of Vancouver, in trust for the plaintiffs. The case was tried to Judge McCredie, and upon his retirement, was determined by his successor in office, Judge McMaster, upon the transcribed testimony. From a decree in favor of defendant, the plaintiffs have appealed.

A short time prior to November 8, 1908, the respondent began negotiations with a Mr. Rowley, the agent of the owners of the property, with a view to purchasing it. The selling price was $16,000, but the terms were not stated. On November 8, the appellants and the respondent entered into an arrangement between themselves for the purchase of the property. It was then agreed that they would purchase it in equal shares. They were desirous of getting the price re-

[1]Reported in 112 Pac. 361.

duced and of arranging the terms of payment. They wanted to pay one-half the purchase price in cash, and to secure time on the remainder. With this object in view, the respondent renewed the negotiations with the agent the following morning. The latter first demanded that the entire purchase price should be paid in money, but upon the refusal of the respondent to treat with him upon a cash basis, he later agreed that he would accept one-half in money and give time on the balance. The agent demanded the immediate payment of $500 earnest money. The respondent told him that the appellant Mayer would pay it, which she did a few minutes later. A receipt was given her in her name for the $500, and a contract for the sale of the property was executed by the owners to the respondent.

The parties to the action all live in Portland, Oregon, but the appellant Mayer is engaged in business at Vancouver, Washington. The earnest money was paid at Vancouver, in the forenoon of November 9. About 6:30 o'clock on that evening, the respondent rang up the appellant Glicksman at Portland, and the latter said to him, "Well, Mike, we got a good buy. Carrie [meaning the appellant Mayer] just came over." The respondent replied, "I guess it's all off. I have somebody else." The appellant Glicksman then called Mrs. Mayer, who continued the conversation with the respondent. The latter then informed her that he had sold a half interest in the property to another party, and that he would send her a check for the money she had paid, to which she demurred. Later in the evening a check for the amount was tendered and refused.

The respondent asserts that the arrangement of November 8 was merely provisional, and that the appellant Mayer refused to unite in the purchase the following day, for this reason, that the price was too high; that she advanced the money as a loan, he agreeing to repay it the same day, and that he called her in the evening to notify her that he would send her the check. His testimony, however, as to the con-

duct of the appellants when he told them that he had taken in another party, makes his statements of the case appear improbable. He says that, when he told the appellant Glicksman that the latter was not in on the deal, he seemed excited, and that the appellant Mayer, when informed of that fact, "commenced to holler," and that her first exclamation was, "You played me a dirty trick." Between eleven and twelve o'clock of that evening, he called the agent, Rowley, to the telephone, and inquired of him in whose name the contract was taken. It is highly improbable that the appellants would have manifested so much displeasure at his statement that he had sold a half interest in the property to another party, if they had voluntarily refused to unite in the purchase a few hours earlier in the day.

The appellants claim that they were purchasing the property with a view of organizing a corporation, and building and establishing a department store. The respondent both affirms and denies this statement. Indeed, it may be said that his testimony in some respects is wanting in candor and impressiveness, whilst the testimony of the appellants has the ring of truth. The appellant Mayer asserts that she advanced the $500 earnest money upon the understanding with the respondent that the appellants and the respondent were purchasing the property in equal shares. We have not overlooked the testimony of the respondent's witnesses Simon and Ball. They gave evidence as to what they heard the respondent say at the telephone on November 9, and that he used the name "Carrie," the name employed by the friends of the appellant Mayer in addressing her. The appellants are relatives. The appellant Mayer is a kinsman of the respondent by marriage. The appellant Glicksman was upon terms of intimate friendship with the respondent, and the parties have all sustained confidential relations for many years. Viewing the testimony as a whole, considering the conduct of the parties and the inferences that may reasonably be deduced, we are convinced that the appellants have sustained the bur-

den which the law puts upon the party having the affirmative.

A *lis pendens* was duly filed on November 11, 1908. Pending the action, the lot was conveyed to the respondent.

The judgment is reversed, with directions to enter a decree declaring the appellants to be the owners in equal shares of an undivided two-thirds of the property, upon their paying into the registry of the court their just proportion of the purchase price with legal interest.

RUDKIN, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9280. Department Two. December 21, 1910.]

MARGARET BEEBE, *Respondent*, v. NORTHWESTERN DAIRY COMPANY, *Appellant*.[1]

APPEAL—PARTIES—NOTICE. An appeal will not be dismissed for failure to serve a notice of appeal upon two corporations, one domestic and one foreign, named in defaults entered, where the complaint alleged that defendant was a domestic corporation, which was denied in an answer alleging that the defendant was a foreign corporation authorized to do business in this state, the sheriff's return did not show whether a foreign or domestic company had been served, and the motion to dismiss by the foreign corporation did not show affirmatively that there was any domestic corporation, the record indicating but one defendant.

Motion to dismiss an appeal from a judgment of the superior court for King county, Webster, J., entered June 28, 1910, in favor of the plaintiff, in an action to quiet title. Denied.

Byers & Byers, for appellant.

Bo Sweeney, for respondent.

PER CURIAM.—Action by Margaret Beebe against Northwestern Dairy Company, a corporation, to quiet title. In paragraph 1 of her complaint plaintiff alleged "that defend-

[1]Reported in 112 Pac. 365.

ant is a corporation, incorporated and existing under and by virtue of the laws of the state of Washington." Northwestern Dairy Company, by its attorneys, moved to strike portions of the complaint. This motion was denied. Thereafter Northwestern Dairy Company, appearing by the same attorneys, filed an answer, in which, after denying paragraph 1 of the complaint, it affirmatively alleged "that this defendant is a corporation duly organized, created, and existing under and by virtue of the laws of the state of Oregon, and has filed its articles of incorporation in the office of the secretary of state of the state of Washington, and has paid its license fee last due." Plaintiff's demurrer and motion to strike this answer were both sustained. Thereafter separate defaults were granted against Northwestern Dairy Company of Washington and Northwestern Dairy Company of Oregon, and judgment for costs was entered against Northwestern Dairy Company of Oregon, which corporation has appealed.

The respondent has moved to dismiss, for the reason that no notice of appeal has been served upon the Northwestern Dairy Company of Washington. In presenting her motion to dismiss, respondent insists that the record discloses the existence of two corporations of the same name, one organized in Washington and the other in Oregon; that they made separate appearances, but that the Oregon corporation only has appealed. The appellant insists that one corporation only exists, it being the appellant incorporated in Oregon. The sheriff's return fails to indicate whether a domestic or foreign corporation was served. The motion to strike did not state that the defendant then appearing was either a domestic or foreign corporation. When the answer was filed, it appeared therefrom that the defendant claimed itself to be an Oregon corporation. The record thus indicates the existence of one corporation only, and appellant could not serve the notice of appeal on any other defendant. If there is a Washington corporation, as alleged in the complaint, but denied by the answer, respondent should affirmatively show that fact

in support of her motion to dismiss. We do not find that appellant failed to serve its notice of appeal upon any other corporation that had appeared.

The motion to dismiss is denied.

[No. 8921. Department One. December 21, 1910.]

S. SHRYOCK, *Appellant*, v. JOHN HANNENEN *et al.*, *Respondents.*[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—LOCAL ASSESSMENTS—DESCRIPTION OF LOTS. A local assessment ordinance for street improvements sufficiently describes the lots to be assessed as all the lots and land abutting on the designated portions of the street, to the depth of 120 feet, without giving the block and lot numbers.

SAME—IRREGULAR BLOCK. A local assessment for street improvements on abutting property to the depth of 120 feet is properly limited to that portion of an irregular block which is within 120 feet of the street.

SAME—UNPLATTED LAND. An irregular block not platted into lots, and used for railroad purposes is properly assessed for local improvements as unplatted land.

SAME—DISTRICTS—PARTIES ENTITLED TO OBJECT. Abutting owners within an assessment district cannot complain that the district improperly included the lands of others not subject to the assessment.

SAME—INEQUALITIES—BENEFITS. Inequalities of a local assessment upon lands similarly situated will not avoid the assessment if the record does not show that the differences were arbitrary, or that the property assessed the highest did not receive a greater benefit.

SAME—COSTS. The reasonable cost of preliminary surveys and advertising may be included in a local assessment.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered December 21, 1909, upon findings in favor of the defendants, after a trial on the merits before

[1]Reported in 112 Pac. 377.

the court without a jury, in an action to foreclose liens for local assessments levied to pay the cost of a public improvement. Reversed.

John C. Hogan, for appellant.

J. C. Cross and *A. Emerson Cross*, for respondents.

FULLERTON, J.—On May 16, 1906, certain persons owning real property abutting upon Front and Marion streets in the city of Aberdeen petitioned the city council of that city to improve the same, at the expense of the abutting property owners, by laying a sixteen-foot plank roadway in the center thereof between certain designated points. Acting on the request of the petition, the city council passed a resolution of intention to improve the street between the points named and in the manner designated, fixed a day for hearing protests against the same, and caused notice to be given thereof as required by statute. On the day of the hearing, no protests being filed, the city council passed an ordinance directing the work to be done. The work was thereupon let to appellant, he being the lowest bidder therefor, who completed it to the satisfaction of the city, whereupon the property benefited was duly assessed to pay the costs thereof. The respondents failed to pay their assessments, and certificates of delinquency against the several parcels of land owned by them were issued to the appellant. This action was brought to foreclose the certificates. The action resulted in a judgment denying the appellant's right to foreclose the certificates, and this appeal was taken therefrom.

In its findings of fact the court recited a number of objections to the proceedings which were seemingly thought fatal to the appellant's right to recover, but many of these were mere irregularities not affecting the merits of the assessment, and we shall notice only these objections which the respondents rely upon in this court as being fatal to the right of recovery.

The first of these is that the resolution of intention to improve the street, and the ordinance creating the improvement district, do not sufficiently describe the property it is proposed to assess to pay the costs of the improvement. The statute under which the city council proceeded (Laws 1903, p. 231, 232), seems not to require any description of the property proposed to be assessed in the resolution of intention to improve the street, and the requirement for the ordinance establishing the improvement district is that it shall include "all property fronting on the street to be improved between the points named in the resolution to a distance back from such street, if platted into blocks and lots, 120 feet; provided the block is 240 feet or more in length, and if less than 240 feet in length, then to the center of the block; if platted only in blocks, to the center of each block; and if not platted, to the distance of one hundred and twenty feet." The resolution of intention, and the ordinance creating the local improvement district, after fixing the termination of the proposed improvement both on Front and Marion streets, provided for assessment of "all of the lots, lands and parcels of land fronting and abutting upon said Front and Marion streets between the points herein mentioned as the terminals of said improvement, and upon each side thereof to a distance back from said street of one hundred and twenty (120) feet."

This, we think, is a sufficient description to comply with the statute. It clearly marks the boundaries of the land proposed to be assessed, and nothing would be added to its definiteness by describing the land included within such boundaries by the number of the lots and blocks as they appear on the recorded plats. The purpose of the description is notice, and certainly any property holder owning property abutting upon or adjacent to the streets described could know definitely from the description given whether any of his property was to be assessed for the proposed improvement.

It is contended also that the ordinance establishing the

assessment district is void because it omits property required by the statute to be included therein. Lying westerly of Front street is an irregular shaped tract which one of the witnesses testified was platted into a block known as block C. This tract was not platted into lots, and the respondents contend that, under the statute above cited, it should have been assessed to its center regardless of its length or width, and that in fact it was not so assessed. The block is not shown on any of the plats introduced in evidence, and consequently it is impossible to tell what its actual dimensions are. A witness testified, however, that its average width was 200 feet. If this be true, and the city assessed it for a width of 120 feet, then clearly no property was omitted from the roll that ought to have been included therein. But we think the tract was properly assessed as unplatted land. It formed a part of a railway company's right of way, and has upon it not only the track of the main line, but numerous spur tracks, and its platting seems to have been rather for the purpose of designation than for commercial purposes. It was proper therefore to assess it back from the streets for a distance of 120 feet.

It is contended further that both the resolution and ordinance are void for the reason that the streets described are nowhere stated to be within the state of Washington. But they show that the streets are within the city of Aberdeen, and this is a sufficient description in that respect. Moreover, the description would be sufficient without even naming the city, on the principle that it is presumed that the city council acted within its power. *Stanton v. Chicago*, 154 Ill. 23, 39 N. E. 987.

A further objection is that the assessment roll includes property not subject to assessment under the statute. This objection would perhaps be valid were the property so included the property of these objectors, but such was not the fact. Property of other persons not subject to assessment was perhaps included in the assessment roll, but the owners

paid the assessment without objection. Surely the respondents cannot avail themselves of the fact to avoid the assessment upon their own property which is concededly within the assessment district.

The respondents object further that the assessment was not equal or uniform, that certain property was assessed at a higher rate than was other property of like value receiving the same benefits, and that certain expense charges were added to the cost of the improvement and included in the assessment roll which ought not to have been so included. But we find no merit in these objections. While it is true that certain property was assessed at a higher rate than was certain other property somewhat similarly situated, the record does not show that the differences were made arbitrarily, or that the property assessed at the higher valuation did not receive a greater benefit from the improvement than did the property charged with the lesser burden. All presumptions are in favor of the regularity of the assessment proceedings. Errors or mistakes therein, in order to avail an objector, must be shown affirmatively. The expenses objected to were the costs of making the preliminary surveys and estimates, and the costs of advertising. These, when reasonable, may be properly charged as part of the costs of the improvement, and there is no evidence here that they were not reasonable charges.

The judgment is reversed, and the cause remanded with instructions to enter judgment foreclosing the several certificates of delinquency.

RUDKIN, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

[No. 9161. Department One. December 21, 1910.]

MINNIE HORTON, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—PERSONAL INJURIES—NOTICE OF CLAIM—VARIANCE. Under a claim against a city for personal injuries alleging that plaintiff was greatly bruised and injured and her whole right side paralyzed, and that she suffered great pain under her kidney, it is permissible to show injuries to the right shoulder and back.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. It is not prejudicial error to permit little more than a mere incidental reference to earning capacity under a complaint failing to allege loss in that respect.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 25, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

Scott Calhoun and *James E. Bradford*, for appellant.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for respondent.

PARKER, J.—This is the second appeal in an action to recover damages for personal injuries. The first appeal was disposed of in our decision reported in 53 Wash. 316, 101 Pac. 1091, when the cause was remanded for a new trial because of errors occurring in the first trial. A new trial resulted in a verdict and judgment in favor of the plaintiff, and the city has again appealed.

It is first contended that the trial court erred in admitting evidence, over appellant's objections, tending to show injury to the shoulder and back of the respondent, upon the ground that no statement of such injury was made in the notice of her claim filed with the city as required by its charter. The

[1]Reported in 112 Pac. 366.

statement in her claim involved in this contention is as follows:

"She was greatly bruised and injured and her whole right side was paralyzed and she suffered great pain under her kidney and right hip joint; and she also suffered severe pains in her right leg."

Respondent was permitted to testify, among other things, as follows:

"A. Well, my back hurt me so bad that I could not hardly lift anything. . . . . A. My back hurts me all the time, I can't lift buckets of water nor nothing of that kind. . . . Q. Was your shoulder affected by that fall? A. Yes, I think the doctor said my right shoulder was about an inch lower than my left one. Q. Now, you say that at the time of the accident this right leg and right arm were paralyzed; is that right? A. Yes, sir; pretty nearly so, I think. Q. I wish you would state to the jury what the condition has been since that with reference to your right limbs? A. Well, my right hand is cold all the time, and my right foot is cold and I don't—I can't feel much with that one, and I froze my foot not very long ago and I didn't know it was froze until I got home. . . . A. Well, I just thought my whole back was hurt, I could not specify that my shoulder was hurt apart from anything else, it was my whole back from my shoulder to my hips."

Her physician was permitted to testify, among other things, as follows:

"The muscles under the shoulder blade, attached to the shoulder blade on the right side, were in a state of tensity. . . . A. What I mean by the back is the right side of the back, understand, and around as far as the muscle that I have described has a function, that is, it is attached all the way along the shoulder blade and will extend pretty well forward, or at least almost to the median line on the side. There is tenderness about both this muscle and over the muscle of the attachment to the wings of the vertebrae on that side. And this tenseness and spastic condition of the muscles attached to the shoulder blade has a tendency to pull the right shoulder down, keeping it in a state of contraction. . . ."

It seems clear to us that, under the liberal rule heretofore adopted by this court relating to the sufficiency of a notice of claim such as is here involved, this evidence was all admissible. We have not quoted all of the evidence of this nature objected to, but that above quoted will show its general nature, and we think comes the nearest to being objectionable of any of it. We think it is easy to see that it all has some relation to her claim that her "whole right side was paralyzed." And her reference in her claim to her "great pain under her kidney," of course relates to pain in the region of the back. We think there was no error in admitting this evidence.

It is next contended that the court was in error in admitting evidence relating to respondent's loss of time and earning capacity, upon the ground that the pleadings did not put that matter in issue. A critical examination of this evidence might disclose a possible technical error, but the evidence is little more than an incidental reference to her earning capacity, and it was not followed up by any attempted showing as to the amount of time she had lost because of the injury. If there was any error in this regard it was too insignificant to warrant reversal of the cause.

It was further contended that the question of the city's negligence and of respondent's contributory negligence should have been taken from the jury and decided in the city's favor as a matter of law. We deem it sufficient to say, in answer to this contention, that a careful review of all of the evidence convinces us that it was clearly sufficient to require the submission of these questions to the jury. The other assigned errors are clearly without merit, and we do not think they require discussion.

We find no prejudicial error in the record, the judgment is affirmed.

RUDKIN, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 8945. Department One. December 21, 1910.]

WILLIAM H. LEWIS, *as Executor, etc., Respondent*, v. WILLIAM CURTIS HILL *et al., Appellants*.[1]

EXECUTORS AND ADMINISTRATORS—TRUSTS—PURCHASE BY TRUSTEE—SALE—SETTING ASIDE—ACQUIESCENCE. The act of an executor and trustee, in permitting his wife to acquire, at a discount, claims of creditors of the estate, to pay for property sold to creditors pursuant to a plan to satisfy claims and save the estate from insolvency, cannot be objected to by residuary legatees of the *cestui que* trust, the widow of the deceased, who for four years prior to her death acquiesced in the proceeding with full knowledge of all the facts, while she and all such purchasers profited greatly by the increased value of the property taken by them; since the sale to the trustee's wife was not absolutely void, but only voidable.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 9, 1910, in favor of the plaintiff, discharging an executor and trustee from the obligations of his trust, and denying relief to cross-complainants for an accounting, after a hearing before the court. Affirmed.

Philip Tindall and *Thomas C. Bradley*, for appellants.

Harold Preston and *Leander T. Turner*, for respondent.

PARKER, J.—This suit was instituted by the plaintiff, for the purpose of obtaining a decree of the superior court for King county, settling his account as executor and trustee under the last will and testament of Alice S. Hill, deceased, and discharging him from the obligations of that trust. The issues here involved arise upon the cross-complaint of William Curtis Hill and James Marshall Hill, sons of Alice S. Hill, deceased, wherein they allege certain acts of the plaintiff to have been unlawful and fraudulent, resulting in loss to Alice S. Hill and her estate. These acts, which we will notice later, all occurred during the lifetime of Alice S. Hill, while the plaintiff was administrator of the estate of William C. Hill, the

[1]Reported in 112 Pac. 373.

deceased husband of Alice S. Hill. Most of the acts complained of occurred in the administration of that estate, while others occurred in personal dealings between the plaintiff and Alice S. Hill. The substance of the complaint is that the plaintiff has withheld from the estate of Alice S. Hill certain property, or rather the proceeds thereof, acquired by him and his wife during the lifetime of Alice S. Hill, which she and her estate became equitably entitled to. It is this property that the cross-complainants seek to have the plaintiff account for, as a part of his trust under the will of Alice S. Hill, deceased. At the conclusion of the evidence in behalf of the cross-complainants, the trial court, upon motion of counsel for the plaintiff, dismissed the cross-complaint and denied the relief prayed for, upon the ground that the evidence was not sufficient to support the claims made against the plaintiff by the cross-complainants. From this disposition of their claims, William Curtis Hill and James Marshall Hill, have appealed to this court.

William Curtis Hill, the husband of Alice S. Hill, died in the year 1890, leaving property in the state of Washington. He left a will making his widow, Alice S. Hill, his sole devisee, but failed to mention any of his children therein, and for that reason the will was declared void by this court as to the children. *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360. Mrs. Hill continued to administer her deceased husband's estate until June, 1895, when she resigned and the respondent, William H. Lewis, was appointed administrator in her place, by the superior court for King county. The administration of that estate was brought to a close on February 1, 1904, when, by the usual court proceedings, final settlement and distribution was decreed, and an order entered discharging respondent as administrator. Thereafter, on August 9, 1904, Alice S. Hill died at Washington, D. C., where she had been living for some years previous, leaving property in the state of Washington. She left a will, giving certain specific property to each of her children, and giving the residue, being by far the larger part

of her property, to the respondent William H. Lewis, in trust for her children, and naming him as executor of her will. We are not here concerned with the detailed provisions of this trust nor with the execution of those provisions, since no question is raised relative thereto. The controversy here involved has to do with matters occurring before the death of Alice S. Hill, and presents the question of whether or not respondent has brought into this trust estate all of the property which in equity belongs there. Learned counsel for appellants, in their brief, state the theory upon which they are proceeding as follows:

"The estate of Alice S. Hill may, for the purposes of this suit, be regarded as the successor of the estate of her husband, William C. Hill, deceased. The theory upon which the cross-plaintiff William Curtis Hill and the intervener James Marshall Hill have raised the issues involved in this appeal is that plaintiff while administrator of the estate of William C. Hill, deceased, wrongfully appropriated to his wife property and funds belonging to that estate, and that he defrauded their mother of property and of the proceeds of other property which belonged to her as the beneficiary of that estate. The relief sought is the restoration to Mrs. Hill's estate of that property and of the proceeds of such as has been sold."

At the time of the death of William C. Hill in 1890, he and Alice S. Hill had eight children; the two sons who are these appellants; a daughter, Elizabeth, who afterwards became the wife of respondent; and five other daughters. As these children became of age, all except the youngest daughter deeded to their mother, Alice S. Hill, their interest in their father's estate; and the youngest daughter becoming of age after the mother's death, deeded to respondent her interest in her father's estate, in compliance with a provision in the will of the mother, as a condition to that daughter receiving certain benefits under that will. Therefore, since these appellants are claiming rights against respondent only as residuary legatees under their mother's will, we are to deal with this controversy as if it was being waged between their mother,

Alice S. Hill, and respondent, and as if no one but Alice S. Hill and the creditors of the estate of her husband, William C. Hill, had any interest whatever in that estate at the time of the doing of the things by respondent which are complained of by appellants. This brings us to a consideration of those acts and the question of the alleged violation of Mrs. Hill's rights thereby.

In the course of the administration of the estate of William C. Hill by respondent as administrator, the title to a considerable portion of the property thereof passed to Elizabeth Hill Lewis, the wife of respondent. The greater portion of the property so passing to Mrs. Lewis, was taken in trust for her mother, Alice S. Hill, and the remainder of it was taken in her own right. The latter is the source of this controversy, and the story of its bringing about is, in substance, as follows: From the time of the appointment of respondent as administrator of the estate of William C. Hill in 1895 until the fall of 1899, that estate was embarrassed by the importunities of creditors, and was in a condition bordering upon insolvency. The total of the estate's obligations was near the amount of the appraised value of its property. In 1899 the estate was indebted upon claims of creditors and for taxes as follows:

Alice S. Hill (Preferred claim)	$18,487.29
Alice S. Hill	25,332.55
Schwabacher Brothers	8,450.00
John Thomas	5,920.00
William Knight	5,472.00
John Leasure	5,472.00
J. H. Parsons	1,720.00
Taxes; the larger part of which were delinquent for several years past and to which statutory penalties and interest had attached; but if paid before November 1, 1899, thereby saving the remitted penalties and reduced interest under the special act of 1899 (Law of 1899, p. 339) amounted to	27,923.22
Total	$98,777.06

There was also due upon attorney's and administrator's fees sufficient to make the total indebtedness of the estate approximately $100,000. The administrator had made repeated efforts since his appointment in 1895 to sell property

of the estate to raise funds to pay its indebtedness, but had been unable to do so. The time had arrived when something must be done towards the liquidation of the indebtedness to prevent insolvency overtaking the estate. The special act of the legislature of 1899, remitting penalties and reducing interest upon delinquent taxes if paid before November 1, 1899, furnished an additional incentive to act in the matter before that time, for it was estimated that over $11,000 could be saved in the item of taxes if paid before that time, and the estate could not pay them except through a sale of its property. This, of course, could be effected by payment direct by the estate from the proceeds of a sale, or by the purchasers at such sale paying them, making the amount of their bids accordingly. In either event the reduction would work to the benefit of the estate if a sale could be consummated in time to pay the taxes before November 1, 1899.

Prompted by these considerations, in the summer of 1899 tentative arrangements were made with all the creditors, including Alice S. Hill, to sell to them property of the estate, at its appraised value, sufficient in amount to satisfy each of their claims. To accomplish the payment of the claims in this manner, it was, of course, absolutely necessary that all of the creditors should agree to such an arrangement. Otherwise such a sale would not have the effect of a cash sale, and the possibility of some of the creditors being unlawfully preferred would not be avoided. It was accordingly planned—Mrs. Hill and all of the creditors joining therein, no one else having any interest whatever in the estate so far as concerns this inquiry, as we have already noticed—that an order of sale of the property of the estate for the payment of the debts of the estate should be obtained from the court by the usual proceedings, and at the sale to be made in pursuance thereof there should be bid in by or in behalf of each creditor a sufficient amount of the property, at its appraised value, to satisfy their respective claims, thus giving the sale the effect of a cash sale. Up to a very short time before the

consummation of the sale, with the first day of November close at hand, it was supposed that all of the creditors would abide by this arrangement and bid for property to the amount of their respective claims; but Thomas, Knight and Leasure finally declined to bid and satisfy their claims in this manner. Thereupon, in order to proceed with the arrangement, respondent purchased for his wife, Elizabeth Hill Lewis, these claims, and she bid in at the sale sufficient property, at its appraised value in her own right, to satisfy these claims, as there was bid in, by or in behalf of all other creditors, sufficient property to satisfy their respective claims. There was paid to Thomas, Knight and Leasure for their claims, approximately only forty per cent of their face value. This, and the use of the claims at face value to purchase the property, constitutes the principal acts of alleged wrong on the part of respondent.

It is quite evident from this record that if Thomas, Knight and Leasure had proceeded with the original arrangement and bid in property in satisfaction of their claims, as was done by or in behalf of the other creditors, instead of selling their claims to Mrs. Lewis and she taking their place, this controversy would never have been heard of. It appears that Knight, Thomas and Leasure were finally unwilling to take property for their claims, in view of its uncertain value, its then lack of marketableness, and the burden or raising sufficient cash to pay the taxes prior to November 1. These were the risks and burdens assumed by Mrs. Lewis and for which she was compensated by the discount in the purchase of the claims. In after years she profited considerably by the increase of the value of this property, and this is the principal thing that appellants seek to compel respondent, her husband, to account for; basing their contention upon the theory that the purchase of the claims of Knight, Thomas and Leasure in this manner was in law a fraudulent speculation by the respondent as administrator in claims against the estate, and that all profits flowing from such dealing became in

equity the property of the estate. We do not propose to discuss the technical legal duties devolving upon an administrator relative to the purchase of claims against the estate he is administering, or relative to his purchasing property of the estate; neither do we propose to discuss the somewhat uncertain question, in the light of this record, of whether or not the purchase of these claims rendered them in law the property of the community, consisting of respondent and his wife, or her separate property. If the latter resulted, it would seem that the decision of this court in *Hipkins v. Estes*, 51 Wash. 1, 97 Pac. 1089, would put an end to appellants' contentions.

The evidence in this case warrants the conclusion that Alice S. Hill, whom we have seen was the only person interested in the estate besides the creditors at the time of the doing of the acts complained of, with full knowledge of all the material facts relating to those acts, acquiesced in and sanctioned them, and profited materially by the liquidation of the debts of the estate brought about in this manner we have narrated. The learned trial court, viewing the evidence in this light, reached the conclusion that Alice S. Hill was not in a position to complain of the acts of respondent, and that these appellants, of course, had no higher right. It was upon this theory that appellants cross-complaint was dismissed. The question of the knowledge and acquiescence of Alice S. Hill is only one of fact. Upon this question we deem it sufficient to say that the evidence convinces us, as it evidently did the learned trial court, of the truth of the following: Alice S. Hill knew, before the sale of the Thomas, Knight and Leasure claims to Mrs. Lewis, that those claims could be purchased at a discount. She had an opportunity to buy them herself if she desired. She learned by correspondence from respondent very soon after the sale, if she did not know of it before, that Mrs. Lewis had purchased these claims and bid in property as other creditors did in satisfaction thereof. She may not have then known the exact amount Mrs. Lewis paid for the claims,

but must have known that they were bought at considerable less than their face value. She knew of the urgent necessity of some one buying these claims who would participate in the consummation of the proposed plan of the sale. She learned early in January, 1900, within three months after the sale, by correspondence from respondent, if she did not already know it, that it was expected that Mrs. Lewis would profit by the purchase of these claims and the taking of property of the estate in settlement of them. Alice S. Hill appears to have been quite well informed of, and had rather decided notions as to the value of the various tracts of land belonging to the estate. Her claims had been all assigned to Mrs. Lewis prior to the sale, which accounts for Mrs. Lewis bidding in and taking a large amount of the property in trust for her mother. Alice S. Hill was informed by letter from respondent very soon after the sale as to what particular tracts of the property had been bid in for her, and what had been bid in by the other creditors; and later, when the details had been more fully worked out, she was informed by letter with greater particularity.

Although learned counsel for appellants strenuously argue to the contrary, we are convinced from the evidence that respondent took great pains to keep Alice S. Hill fully and fairly informed as to all facts she was entitled to know touching the purchase of these claims for Mrs. Lewis, and the liquidation of the same with all other claims by the sale of the estate's property. She lived for more than four years after these things occurred, continuing friendly business relations with respondent, during which period she repeatedly evidenced her satisfaction with his conduct in bringing about the liquidation of the debts of her deceased husband's estate, and in his administration of that estate. During this period the increase of value in real property in the state of Washington resulted in large profits to all creditors who had taken property of the estate in settlement of their claims. She shared in this profit, and of course knew that her daughter,

Mrs. Lewis, shared in it in the same proportion upon the property she had acquired. During all this time there does not appear the slightest intimation from Alice S. Hill that she or her husband's estate was entitled to any of the property thus acquired by Mrs. Lewis. In the meantime the estate of William C. Hill was brought to a final settlement in the spring of 1904, some months before the death of Alice S. Hill. We will pass, however, the question of the binding force of that settlement upon her, since but little is made of it by counsel for either party. Upon the matter of Mrs. Hill's capabilities, we adopt the language of the learned trial judge in disposing of appellants' claims, which we think the evidence fully warrants, as follows: "It appears . . . . that during the time of those transactions which are the basis of this controversy that Mrs. Hill was an exceedingly bright, intelligent and capable woman."

With these facts before us, the law of the case seems a simple matter. We have seen that, for the purpose of this inquiry, Alice S. Hill will be regarded as the only person with any right whatever to object to the acquisition by her daughter, Elizabeth Hill Lewis, of the property of the estate in the settlement of the Thomas, Knight and Leasure claims. Alice S. Hill is, in effect, the sole *cestui que trust;* and when her rights are not invaded, no one can complain. Such, reduced to its simplest terms, are the limits of this inquiry. Assuming now that Mrs. Lewis' acquisition of this property was for the community and not as her separate property, and that therefore the matter must be dealt with as if respondent was acquiring an interest in it, we think the principle of law controlling the rights of the parties may be stated in the language of Chief Justice Fuller, speaking for the supreme court of the United States in *Hammond v. Hopkins*, 143 U. S. 224, 251, as follows:

"Undoubtedly the doctrine is established that a trustee cannot purchase or deal in the trust property for his own benefit or on his own behalf, directly or indirectly. But such a pur-

chase is not absolutely void. It is only voidable, and as it may be confirmed by the parties interested, directly, so it may be by long acquiescence or the absence of an election to avoid the conveyance within a reasonable time after the facts come to the knowledge of the *cestui que trust.*"

See, also, *Brown v. Cowell,* 116 Mass. 461, 465; *Miggett's Appeal,* 109 Pa. St. 520; *Butterfield v. Cowing,* 112 N. Y. 486, 20 N. E. 369; *Ungrich v. Ungrich,* 131 App. Div. 24, 115 N. Y. Supp. 413, 417.

We are of the opinion that Alice S. Hill acquiesced in the acts of respondent, and that whatever might be said as to those acts being technically unlawful, as against those who had a right to complain, they are not such acts as she had the right to complain of at the time of her death, and hence these appellants, who claim only as her devisees, have no better right.

The other things complained of by appellants occurred in connection with personal dealings between respondent and Alice S. Hill. They consist of alleged inducements made by respondent, resulting in the transfer of certain of her property to him for inadequate consideration. These contentions we regard wholly without merit. A review of them in detail would disclose a condition of affairs somewhat like that which we have reviewed above, so far as her knowledge of conditions surrounding them is concerned. The evidence, we think, clearly shows that in these transactions she knew what she was doing, got all the consideration she agreed for, and that to a considerable extent they were transactions of her own suggestion.

Some question is made upon the admissibility of certain testimony brought out upon cross-examination of respondent by his attorney while upon the stand as a witness for appellants. This testimony related to conversations between respondent and Mrs. Hill during her lifetime, and for that reason was objected to by appellants' counsel. We will not attempt to solve this question, since we are of the opinion that the other evidence consisting, among other things, of a vast

amount of correspondence passing between respondent and Mrs. Hill concerning the matters involved, fully warrant the conclusion reached by the learned trial court.

We are of the opinion that the dismissal of appellants' cross-complaint should be affirmed. It is so ordered.

RUDKIN, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 8912. Department Two. December 21, 1910.]

FRED H. HYDE *et al.*, *Appellants*, v. HENRY PHILLIPS, *Respondent*.[1]

VENDOR AND PURCHASER—CONTRACT — SALE IN GROSS — ACREAGE—DEFICIENCY. A contract to convey certain legal subdivisions of land "containing 399 1-3 acres" the purchaser agreeing to pay "at the rate of $27.50 per acre, a sum in total of eleven thousand dollars," is a sale in gross, and the vendee is not entitled to a deduction in the price on a survey showing a deficiency of 31 acres, where it appears that the parties contracted in good faith, neither knew the exact acreage, and the land was not the only subject of the contract, some personal property and a lease of other lands being included.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 19, 1910, upon sustaining a demurrer to the complaint, dismissing an action for specific performance. Affirmed.

H. J. Hibschman and *N. W. Washington*, for appellants.

John L. Dirks, for respondent.

CHADWICK, J.—On the 16th day of September, 1908, the parties to this action entered into a contract for the sale of land, the parts of the contract material to our present inquiry being as follows:

"Witnesseth: That the party of the first part hereby sells and conveys to the party of the second part the following described real estate and personal property, to wit: The

[1]Reported in 112 Pac. 257.

north half (N. ½) of section nineteen (19), and the southwest quarter (S. W. ¼) of section eighteen (18), township twenty-six (26), all north of range thirty-one (31) E. W. M., containing three hundred and ninety-nine and one-third acres, all in Lincoln county, state of Washington;

"In consideration therefor the party of the second part hereby agrees to pay for the same at the rate of twenty-seven dollars and fifty cents per acre, a sum in total of eleven thousand dollars. In payment as follows: Two hundred dollars payable in cash, twenty-eight hundred dollars, on or before the first day of November, 1908, and the balance in three equal payments, payable annually or before at the option of the party of the second part. The deferred payments to bear interest at the rate of six per cent per annum. The party of the first part further sells to the party of the second part, for the consideration above mentioned, all the straw and one stack of hay now on the S. W. ¼ of sec. 18, and one superior drill. . . . The party of the first part further agrees to assign to the party of the second part all his right in and to a certain lease upon the N. W. ¼ of section 18, township 26, R. 31, to pay the rental for 1908, and to convey to the party of the second part his interest in the plowing done on said land."

The sum of $200 was paid when the contract was executed. Appellants took possession under the contract, and thereafter had the land surveyed. It was found to contain 358 acres, or 31 1-3 acres less than the area mentioned in the contract. In November, 1909, appellants tendered the sum of $7,286.95 in full payment for the land, being the whole amount due at the rate of $27.50 per acre, upon the acreage as ascertained by the survey. This tender was refused, respondent demanding the full sum named in the contract; that is, $11,000, less the $200 paid down and an existing mortgage of $2,000. This action was then brought to enforce specific performance of the contract and to compel the execution of a deed. From an order sustaining a demurrer to the complaint, plaintiffs have appealed.

There is but one question in this case, whether the sale was by the acre or in gross. It seems to be admitted that the

actual number of acres was unknown to either party at the time the contract was entered into. The complaint recites:

"That at the time of the execution of the agreement neither of the parties thereto knew the exact number of acres in said premises, and that the plaintiffs did not ascertain the same for a number of months after the execution of said agreement."

If the sale was made by the acre, and the difference held to be a material one, appellants would be entitled to an abatement of the purchase price in a sum equalling the difference between the number of acres mentioned in the contract and the amount ascertained by the survey. On the other hand, if it was a sale in gross, appellants would be held to the payment of the purchase price notwithstanding a deficiency in the area. Whether it was a sale in gross or by the acre depends upon the intention of the parties. In the case at bar we are held to an examination of the complaint and to a construction of the contract.

Where land is sold by reference to maps, plats, or government subdivisions, followed by the number of acres contained therein, the rule, as stated by Chancellor Kent, is as follows:

"The mention of quantity of acres after a certain description of the subject by metes and bounds, or by other specifications is but a matter of description, and does not amount to any covenant, or afford any ground for the breach of any of the usual covenants, though the quantity of acres should fall short of the given amount." 4 Kent, Commentaries (14th ed.), 467.

The rule deduced by Mr. Warvelle is as follows:

"Where the quantity of a tract of land is stated in the deed as well as the metes and bounds, the latter, if they can be ascertained with certainty, will control the location, although they contain less than the given quantity—the designation of quantity never being permitted to control the boundaries where they are clearly indicated. But where there is doubt as to the true description, such designation of quantity may be properly considered. As a rule, however, a recital in a conveyance of land that the tract contains a certain number of

acres will always, unless there is an express covenant as to quantity, be regarded as part of the description merely, and will be rejected if inconsistent with the actual area as ascertained by known monuments and boundaries. Such recital aids but does not control the description of the granted premises. The word 'about' so frequently employed in connection with statements of quantity, is generally regarded as a word of approximation only; it will not cover any material deficiencies." Warvelle, Vendors (2d ed.), § 381.

Brewster, in his work on Conveyancing, § 92, says:

"Courses and distances mentioned generally control the statement of quantity, the latter being considered, generally speaking, as less likely to be definite. A statement of quantity has little effect when the rest of the description is definite and accurate. . . ."

Devlin finds the rule to be:

"In the description of land it is usual, after the description by metes and bounds or subdivisions, to add a clause stating that the land described contained so many acres. But unless there is an express covenant that there is the quantity of land mentioned, the clause as to quantity is considered simply as a part of the description, and will be rejected if it is inconsistent with the actual area, when the same is capable of being ascertained by monuments and boundaries. The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description. Neither party has a remedy against the other for the excess or deficiency, unless the difference is so great as to afford a presumption of fraud. Where an owner of a league of land, having sold off several tracts, executed a deed for the unsold balance, which described it as 'all' and singular a certain piece or parcel of land containing one thousand acres, situated and described as follows: 'In Harris county, and on Buffalo bayou, adjoining the city of Houston, being the undivided part of the league granted to Allen C. Reynolds'—it was held that the deed conveyed title to the whole of the unsold balance, although in excess of the number of acres mentioned." Devlin on Deeds, § 1044.

See, also, 13 Cyc. 635; 2 Washburne, Real Property, p. 672; 29 Am. & Eng. Ency. Law (2d ed.), 625, 628 .

Practically all of the cases where the term "more or less" is employed, are in point, for where the description is by metes and bounds, or by reference to fixed boundaries or subdivisions, the general rule is applied, but little if any importance being attached to the words "more or less." Reference to a few cases where the description was by government subdivision will not be out of place. A case is reported in 33 Iowa 110, where Ufford sued Wilkins, and the case turned on the construction of a deed to the southwest quarter of the northwest quarter, etc., followed by the words, "being forty acres." It was held:

"The rule is that when the *quantity* of land is mentioned in a deed as part of the description, it will be rejected if it be inconsistent with the actual area of the premises as ascertained by known monuments or other certain description, where the tract is definitely described and limited, as in the present instance, according to the original survey, so that any surveyor can ascertain its contents, and if within the boundaries, according to the description, there be less or more than the supposed quantity of land, the grantee takes all included within the description. No more and no less, if the grantor had right to convey all. The grantee, in his purchase, must be considered as relying on the boundaries described, and not on the contents mentioned." *Ufford v. Wilkins*, 33 Iowa 110.

So, too, in *Kerr v. Kuykendall*, 44 Miss. 137, the description was "section 22," etc., and the price, $1,920, was calculated on a basis of three dollars per acre. A subsequent survey showed the section to be of less area. Applying the rule announced in *Fulton v. McAfee*, 5 How. (Miss.) 751, 762, "that 640 acres is the strictly legal complement of a section, yet it is well known that not one section in ten contains that quantity. Some contain more; some less; but they are sections nevertheless," the court held there having been no artifice, fraud, or misrepresentation, that the sale was in gross and not by the acre. In *Perkins' Exr's v. Winter's Adm'rx*, 7 Ala. 855, it was held:

"We are now brought to inquire, whether the complainants are entitled to relief for the supposed deficiency, in the quan-

tity of the land purchased by the testator. It has been held, that although the purchaser of a tract of land, promise to pay a certain sum *by the acre*, yet if he also agree to take it by the patent, or survey previously made (in the absence of fraud on the part of the vendor), he must be understood to risk the quantity; and therefore is not entitled to any compensation for deficiency. . . . In the case at bar, the land of which the testator was the purchaser, was sold by the quarter section, according to the survey made under the authority of the Federal government, and each quarter was supposed to contain one hundred and sixty acres—that being the proper size of such a subdivision. By bidding it off at a certain sum per acre, the purchaser expected to pay for so much land, as the patent from the United States to the patantee, recited to be the number of acres embraced by each quarter section. Neither party contemplated a survey in future; and if the tracts were larger than supposed, the purchaser would be entitled to the excess, or if less, he must stand by his bargain. This view of the case, as it respects the assumption of fact, is sustained by the record, and the legal conclusion seems to us to result so clearly, from the authorities cited, as to make it unnecessary to amplify the point."

In *Austrian v. Dean*, 23 Minn. 62, the land was described as a legal subdivision containing twenty acres more or less. The land sold actually contained but 17.15 acres. The purchaser brought suit for relief, claiming that the words "containing twenty acres more or less according to the government survey" amounted to a covenant that by the government survey there should have been twenty acres in the piece described. It was held:

"Words expressing the quantity, in a deed of a tract otherwise definitely described, are held to be merely additional description, and are controlled by the definite calls in the deed, and, therefore, immaterial. Being inserted merely as matter of description, and not for the purpose of covenant, it is not material, where there is no fraud or express covenant as to quantity, whether the quantity is more or less than that stated."

To take the case out of the general rule there must be an express covenant or some allegation of fraud or misrepresen-

tation. There must be artifice and deceit or, as some courts have held, the deficiency must be so great as to warrant a court in saying that the deficiency amounts to a failure of consideration. There is no such allegation in the complaint before us.

It is alleged that neither party knew the exact acreage, which in itself is some confirmation of the assertion of the respondent that it was a sale in gross and that quantity was not of the essence of the contract. In arriving at the intention of the parties—and that is the test to be applied in this class of cases—we must look to the whole contract rather than to a single recital. The fact that the parties contracted in good faith has been alluded to. Another incident is that the land was not the only subject of the contract. There was personal property, a lease of other lands was assigned, and the interest of the vendor in certain plowing on the leased land also furnished a part of the consideration which, as expressed in figures, amounts to more than would the estimated acreage if sold at $27.50 per acre. It would seem to be manifest, also, that the intent of the vendee was to pay, and the vendor to receive, the gross sum of $11,000. These items are all suggestive circumstances tending to show that the sale was in gross. While the words "twenty-seven dollars and fifty cents per acre," as employed in the contract, are significant, they are not controlling, as against the facts and circumstances outlined above. 29 Am. & Eng. Ency. Law (2d ed.), 629; *Kerr v. Kuykendall, supra; Terrell v. Kirkey*, 14 Ala. 209.

The complaint did not state a cause of action, and the judgment is affirmed.

RUDKIN, C. J., CROW, MORRIS, and DUNBAR, JJ., concur.

[No. 9049. Department Two. December 21, 1910.]

F. R. MARGETTS, *Respondent*, v. E. R. LINDSEY, *Appellant*.[1]

SALES—RESCISSION BY VENDEE—FRAUD—LACHES—EVIDENCE—SUFFICIENCY. An action to rescind a sale of a reporting business, for false representations as to the income of the business, is properly dismissed, where it appears that the vendee had ample opportunity to make, and did make, a full investigation as to the truth of the representations, and inspected the books, making no objections to the sale for over a month after taking up the business, and the parties were dealing at arm's length.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 16, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on promissory notes. Affirmed.

W. H. Plummer, for appellant.

Charles P. Lund, for respondent.

DUNBAR, J.—This action was brought by the respondent against the appellant, to recover $500, interest, and attorney's fees, upon five promissory notes, executed by the appellant, E. R. Lindsey, to the respondent, F. R. Margetts, each of said notes being for the sum of $100 and dated January 12, 1909, due and payable respectively on March 12, 1909, April 12, 1909, May 12, 1909, June 12, 1909, and July 12, 1909. The complaint was in the usual form in a suit on promissory notes, alleging their execution and default in the payment, demanding the amount of the notes with interest, and attorney's fees, $50. The answer admitted the execution of the notes, denied that there was anything due; and set up as an affirmative defense, that the notes were given as part payment of the purchase price for respondent's half interest in the court reporting business of Pelletier & Margetts in

[1]Reported in 112 Pac. 339.

the city of Spokane, Washington; that on or about the 8th day of January, 1909, at the special instance and request of respondent, appellant gave up his business in the city of Vancouver, British Columbia, and came to Seattle, where Margetts met him, and there negotiations were had which resulted in appellant's purchasing the interest of Margetts in said reporting business, agreeing to pay him therefor $1,300, $50 of which was then and there paid; that thereafter Lindsey and his wife moved to Spokane, when $650 more was paid, and the contract of sale entered into; that during the negotiations which were had between Margetts and Lindsey in Seattle, Margetts misrepresented the condition of said reporting business, lied to and deceived appellant by purporting to show in writing the amount of money that had been received by the firm of Pelletier & Margetts during the twenty months previous to said time, and lied to and deceived him in other ways; that upon discovering the false and fraudulent representations, he immediately rescinded the contract, and tendered to Margetts said business and the contract; asked that the said notes be cancelled, and that appellant have judgment for the amount of money which he had paid. The case was tried by the court, and findings made in favor of plaintiff. The findings of fact and conclusions of law as found by the court were excepted to. Judgment was entered for the amount prayed for, and from such judgment, this appeal is taken.

Upon the conclusion of the testimony, the court remarked: "I am convinced from the testimony here that there is no evidence of any fraud on the part of Mr. Margetts, either actual or constructive;" and further said that he had not any hesitancy at all, from the evidence, in finding for the plaintiff and against the defendant. From a review of the testimony, we think the court was amply justified in coming to this conclusion. Conceding the truth of the statement made by the appellant, that the respondent in the conference held by them in Seattle had misrepresented the financial

standing of the partnership—although this is denied by Margetts, all the testimony, including that of the appellant, shows that he had ample opportunity to investigate the financial standing and past history and future prospects of the business, before the final consummation of the purchase.

It appears from the testimony of the appellant himself, brought out on cross-examination, that about a month before his conference with the respondent at Seattle, he had visited Spokane during the apple show there; and while he faintly denied that he was looking around then for a location contemplating his removal from Vancouver, it does appear that several times he visited the office of Pelletier & Margetts; that he talked with them about the reporting business in Spokane; that he had under consideration a purchase of the reporting business of one Mrs. Scott, and that he talked with Margetts and Pelletier about Mrs. Scott's business, they stating that they were very anxious to get Mrs. Scott out of the reporting business in Spokane; that after he went home and before receiving the letter from Margetts which finally led up to the execution of the contract, he sent Mrs. Scott an offer for her business. It also appears that, after arriving in Spokane, on the day on which the contract was executed, he received certain of the books of the firm from Margetts, and took them to his rooms at the hotel where he and his wife were stopping; and while he says that he did not remember telling Margetts at about three o'clock in the afternoon that he had examined these books, the whole testimony shows that he had, to a certain extent, examined them, and that if he had not it was his own fault. It is true, he stated that he had only the ledger and the cash book at the hotel with him, and that he could not tell definitely about the business of the concern without the daybook. But there is nothing to show that he could not have received the daybook by asking for it, and it was not until about half past seven o'clock that evening that he finally paid over the $600 and entered into the contract.

In addition to this, one of the notes which was executed

fell due on February 12, 1909, and that note was paid by him to Margetts without any objection, on the date of its maturity, after he had been engaged in the business as an active partner for one month. Again, on February 23, he wrote to Margetts asking for an extension of time for the payment of the next note, which would fall due on the 12th of March following. This extension being refused on March 2, 1909, he wrote to the respondent that, on account of fraud and misrepresentation perpetrated upon him, he tendered back the business of court reporting, and demanded the return of his money. He, however, brought no action to rescind the contract or to affirm it and sue for damages, but contented himself with continuing in the business, and receiving the benefits of the business until the notes had matured and this suit was brought.

It is true, he says that, after he went into the office, he found that the business was not such as it had been represented to be, and that the books showed that they had not received the amount for the past twenty months that it had been represented to him that they had received; and that he did not have access to the daybook so that he could ascertain this fact, until about the time when he had refused payment on the notes. This testimony was very vigorously denied by both Margetts and Pelletier. Mr. Pelletier, when asked if he had heard the testimony to the effect that Lindsey had asked him for the books and that he told him that there was no use examining them; that the statement made by Mr. Margetts was correct, responded: "Yes, I heard that testimony, and it is absolutely false. He never called on me for the books when I made any statement of that kind at all. The first time he called on me for the books I gave him the key then." Witness further states, that the desk to which he had given the key was a roller top desk; that all the books pertaining to the business were in the drawers, which were opened when the roller lid was let down; and all the circumstances surrounding the case point to the truthfulness of the

testimony of Mr. Pelletier. Even accepting his own statement, appellant could not prevail. The parties to the contract were strangers; no confidential relations existed; the means of ascertainment were available, and by entering into an investigation which ordinary prudence would suggest, the approximate value of the business could have been determined. Under such circumstances the law will not sanction the abrogation of a written contract. Affirmed.

RUDKIN, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 9138. Department Two. December 21, 1910.]

ARTHUR DAHLSTROM, *a Minor, by his Guardian Ad Litem, John A. Dahlstrom, Respondent*, v. INLAND BOX AND MANUFACTURING COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURIES—INSTRUCTIONS—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY. There is no evidence warranting a verdict for personal injuries sustained by a green hand, a boy seventeen years of age, who was injured by a rip saw while doing his first work, and as claimed by reason of inadequate instructions, where it appears from his testimony that he was instructed in the use of the saw, the operation was simple, and he did not know when or how his hand came in contact with the saw, the accident being a complete mystery to him.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered March 25, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor employee in a box factory. Reversed.

Alfred M. Craven, for appellant.

William A. Monten and *Danson & Williams*, for respondent.

RUDKIN, C. J.—On the afternoon of June 21, 1909, the plaintiff entered the employ of the defendant in its box fac-

[1]Reported in 112 Pac. 345.

tory in the city of Spokane. At the time of his employment, the plaintiff was a few months under the age of seventeen, was of fair size and of at least average intelligence for one of his years. For the first hour or so in the afternoon he was engaged in carrying lumber into the mill and piling box material. Immediately thereafter the foreman set him to work at a ripsaw, such as is in common use in an establishment of that kind. The table supporting the ripsaw was about three feet by four and one-half feet in dimensions, and two and one-half or three feet high. The saw itself, which was twelve inches in diameter, was attached to an arbor underneath the table, so that the blade extended one and one-half inches above the plane of the table. A spreader stood nearly upright behind the saw, and a circular guard one and one-half inches in width extended from the spreader over the top of the saw, one and one-half inches above the teeth. A guage stood out from the saw ten or ten and one-half inches, to regulate the width of the material to be ripped or trimmed.

At the time of receiving the injuries complained of, the plaintiff was engaged in trimming box material. The pieces upon which he was working were eighteen inches in length, ten or ten and one-half inches in width, and substantially one inch in thickness. It was the duty of the plaintiff to trim the pieces down to this width, and in order to accomplish this, it was necessary to rip an inch or more off the edge of each board. After he had been engaged in this work for some time, and had trimmed perhaps one hundred pieces, his hand in some manner unknown and unexplained came in contact with the saw, causing injury to the thumb and little finger, for which a recovery was sought in this action. The defense was a denial of negligence on the part of the defendant, and a plea of assumption or risk and contributory negligence on the part of the plaintiff. The trial resulted in a judgment in favor of the plaintiff in the sum of $2,000, from which the defendant has appealed.

The only assignment of error we deem it necessary to dis-

cuss or consider is based on the insufficiency of the evidence to justify the verdict and judgment. The complaint alleged that the saw table was rough and uneven; that the saw was old, rusty and dull, and improperly set, and that the guard was old, worn, rusty, flimsy in construction, and vibrated excessively when the saw was in motion; but all these charges were wholly abandoned at the trial, and the sole ground of negligence now relied on to support the judgment is the placing of the respondent at work about dangerous machinery, without adequate instructions to protect him against the dangers incident to his employment. There was a conflict in the testimony as to the character and extent of the instruction actually given, and we must therefore accept the testimony most favorable to the respondent on that issue. He admits that the foreman shoved at least two boards or pieces through the saw in his presence, showed him how and where to place his hand, and cautioned him to keep his fingers away from the saw. The following testimony given by the respondent will show the uncertainty existing in his own mind as to the cause of the accident, or the manner in which the injury was inflicted:

"Q. You had sawed this board, this board in question, I believe you had sawed this board which is marked plaintiff's Exhibit 1, completely through, hadn't you? A. Yes, sir. Q. And you knew your work was done in respect to this board, and you had reached for another board? A. Yes, sir. Q. And then you noticed for the first time that your hand was injured? A. Yes, sir. Q. So that any difficulty you had in pushing the board through that you testified to, would have nothing whatever to do with your injury, would it? A. I don't know. Q. Well, you had sawed the board completely through? A. Yes, sir. Q. Now, how near—just show us again how you placed your hand when you were sawing that board? A. Just like that (Illustrating.) Q. Your hand was not within three or four inches, then, of the line of the saw, was it? A. No, sir. Q. If you had placed your hand over on the edge of the board, your hand would have been at least eight inches from the saw, would never have come nearer than eight inches to the saw would it?

A. No, sir. Q. That is the way you were doing, or told to do, wasn't it? A. He told me to place my hand here, did not say how far to keep it away from there; just to keep my thumb away from there. Q. He told you to be sure to keep your thumb away from the saw? A. Yes, sir. Q. And when you started to saw these boards, you were putting your hand way over as far as you could from the saw? A. Yes, sir. Q. And you did that all the while? A. Yes, sir. Q. You placed your hand as far on the edge of the board as you could, in order to do your work? A. Yes, sir. Q. And that is what you were told to do? A. Yes, sir. Q. Mr. Hicks told you to do that? . . . . A. Yes, sir. Q. Now, you are satisfied that you had sawed the strip completely off of this board when you were injured, are you? A. Yes, sir. Q. And you are satisfied that you had reached for another board over on your left? A. Yes, sir. Q. You had reached for another board? A. Yes, sir. Q. And then it was that you noticed that your right hand was injured? A. Yes, sir. Q. Have you any idea how long you were injured before you noticed it? A. No, sir. Q. Well, you hadn't sawed many boards, had you? A. I sawed about a hundred. Q. Yes, but you hadn't sawed many boards before you noticed this injury, after you were injured and before you noticed the injury? A. I hadn't sawed any boards after I was injured. Q. And you think you had your hand away four or five inches from the saw? A. Yes, sir. Q. You don't know how your hand got to the saw? A. No, sir. Q. Can't imagine? A. No, sir. Q. Can't imagine how it could have got on top of the saw by reason of the hood? A. No, sir. Q. And the whole thing is a mystery to you, isn't it? A. Yes, sir. Q. You were doing all that you could do to keep from being injured? A. Yes, sir."

Under the foregoing facts it is the merest speculation to say that the injury resulted from a failure to give adequate or proper instructions. There was nothing inherently or necessarily dangerous in the work about which the respondent was engaged. The saw was small and thoroughly and completely guarded, so far as its efficiency would permit. The danger zone was limited. The boards were ten inches in width, and it was not necessary for the respondent to bring his hand within

less than five or six inches of the saw while shoving the material through. The operation was simple, and the instructions given were explicit and ample, if followed. The respondent placed his hand as directed, and nothing unusual or out of the ordinary happened while the board was passing through the saw. He did not know how or when the injury happened, and it would be the height of folly for either court or jury to attempt to answer these questions. If we cannot say how the accident happened, how can we say that it was the result of improper or inadequate instructions. If it was all a mystery to the respondent, could it be less of a mystery to the jury? If we were to indulge in speculation, the most reasonable inference is that the respondent in some manner thrust his hand into the saw beneath the guard when reaching for a board, a danger open and apparent to him, and a danger against which he was duly cautioned. Respondent relies largely on the rule announced in *Wickstrom v. Preston Mill Co.*, 48 Wash. 164, 93 Pac. 213, and *Von Postel v. Lake Sammamish Shingle Co.*, 51 Wash. 261, 98 Pac. 665, but these cases do not warrant a recovery here. In the *Wickstrom* case the saw was out of repair and of a much more dangerous character, and the operator's hand was thrown into the saw involuntarily, because he did not know how to operate it. The facts in the *Von Postel* case were somewhat similar. Here there was no defect in the saw or in the surroundings, and there is nothing to show that the respondent's hand was thrown into the saw by reason of the manner in which he was attempting to operate it, or because he did not have adequate or proper instructions.

For these reasons we are of opinion that the testimony did not warrant the submission of the case to the jury, and the judgment is accordingly reversed, with directions to dismiss the action.

CHADWICK, CROW, DUNBAR, and MORRIS, JJ., concur.

[No. 9127. Department Two. December 21, 1910.]

In re CITY OF RENTON.

THE CITY OF RENTON, *Respondent*, v. R. T. DYKEMAN *et al.*, *Appellants*.[1]

NEW TRIAL—GROUNDS—INSUFFICIENCY OF EVIDENCE. A new trial should not be granted on the ground that the verdict is contrary to the evidence merely because the court differed with many of the witnesses as to the extent of the damages.

Appeal from a judgment of the superior court for King county, Robert H. Lindsay, Esq., judge *pro tempore*, entered January 10, 1910, upon the verdict of a jury awarding damages in condemnation proceedings. Affirmed.

Farrell, Kane & Stratton, for appellants.

Paul W. Hauser (*L. Frank Brown*, of counsel), for respondent.

MORRIS, J.—The city of Renton instituted a condemnation suit against appellants, seeking to acquire the right to take water from a creek flowing through appellants' lands. Trial was had and verdict in the sum of one dollar each awarded appellants. They made a motion for a new trial, which was denied. The court, in denying appellants a new trial, incorporated his decision in the record, as follows:

"Superior Court, King Co., Wash.

"In the Matter of the Petition of the
City of Renton. No. 67178.

"The court in denying the motions for a new trial in all the cases where Farrell, Kane & Stratton represented the respondents, state that, in view of the fact that it is the undoubted law of this state that the jury are the sole judges of the facts, and that as I view the law as expressed by our supreme court that, where the jury has once passed upon the facts, that the court is only justified in granting a new trial where the verdict of the jury is contrary to the weight of the

[1]Reported in 112 Pac. 348.

evidence, I am constrained to overrule the motions for new trial, although as an individual I do not think that justice has been done by any of the verdicts, and this solely because I differ with many of the witnesses who testified in the case.

"Each of the respondents excepts to above and excepts to the ruling of the court in denying his motion for a new trial. Exception allowed.

"The above is hereby made a part of the record herein. Dated January 3, 1910.

"Robert H. Lindsay, Judge Pro Tem.

"Present, attorneys for all parties."

This ruling is the error complained of.

If the court below indicated his opinion by the language used, and we assume he did, no other ruling was possible. The question was solely one of fact, and it was of no consequence that the court differed with some of the witnesses as to the extent of the damage. That is not an unusual thing in trials of this character. But inasmuch as our system makes the jury the arbiter of such questions, their decision, when there is no error in the submission, is final. The case here is not within *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108. In that case the court below indicated he made his ruling because of his belief in a lack of power to do otherwise. This court held he had the power to grant a new trial where the verdict was contrary to the weight of the evidence. The court below, in the case at bar, correctly thus states the law in its ruling as set forth. He does not hold the verdict is contrary to the weight of the evidence, but announces that he differed with many of the witnesses. This would be no reason for any interference with the verdict, unless he went further and was of the opinion that it was clearly contrary to the weight of the evidence. Judgment affirmed.

RUDKIN, C. J., DUNBAR, CROW, and CHADWICK, JJ., concur.

[No. 9107. Department Two. December 21, 1910.]

CHARLES SCHOENING *et al.*, *Respondents*, v. MAPLE VALLEY LUMBER COMPANY, *Appellant*.[1]

GUARANTY—CONTRACT—CONSIDERATION. Forbearance to collect an account from a logger, and extension of credit for further supplies enabling the debtor to continue logging, is a sufficient consideration for a contract by a lumber company to guarantee the account to the extent of fifty cents per M for all logs furnished it; all parties being thereby benefited.

GUARANTY—CONTRACT—CERTAINTY—MUTUALITY. An agreement to guarantee a logger's account to the extent of fifty cents per M on each raft of logs furnished to the promisor until notice given to the promisee, is an original undertaking, and not void for uncertainty or want of mutuality.

PLEADING—AMENDMENTS—VARIANCE. It is not error to allow an amendment before trial, increasing the amount claimed on a contract of guaranty, where no surprise was claimed or continuance asked; and no variance results from proof of the increased amount.

Appeal from a judgment of the superior court for King county, Gay, J., entered December 11, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

William Hickman Moore, for appellant.

Faben & Kelleran, for respondents.

MORRIS, J.—On September 9, 1908, George Kelly, a logger, was indebted to the respondents upon an account for butcher's supplies furnished him in his logging operations, in a sum exceeding $374.10. Kelly was then, and for some time previous had been, a logger delivering his logs to the appellant. Not paying his account with respondents, they became unwilling to further supply him, and notified him they would discontinue his account unless they could have some money, and asked him if there was any way in which he could secure the account. Kelly answered he knew of no way unless the

[1]Reported in 112 Pac. 381.

appellant would give security. Respondents thereupon suggested to him that he see the appellant and have it guarantee the account; and if it did not do so, they would not carry the account longer and would take steps to collect it. Thereupon Kelly went to appellant, and the same day, on his return, handed respondents the following writing:

"Bryn Mawr, Wash., Sept. 9, 1908.

"Palace Market Co.

"Gentlemen: Commencing with the next raft of logs that comes in from George Kelly, we will pay you 50c per M. on scale bill on each raft to apply on his account with you. This will hold as long as his account is kept satisfactory with us, but be left entirely with us as to when we may cease to pay as above or not. We will notify you in any case. Yours,

"Maple Valley Lbr. Co.,
"Per W. F. Brown, Sec'y."

In February, 1909, respondents brought suit against appellant on this agreement, alleging its execution in consideration of respondent's waiver of any action against Kelly, and for the purpose of enabling Kelly to continue his logging operations and delivery of logs to appellant, and the release of the logs from any charge or lien of respondents. Thereafter Kelly delivered to appellant 748,205 feet of logs, whereupon there became due respondents upon the agreement the sum of $374.10, for which judgment was asked. Answering, appellant admitted the making and delivery of the writing, denying the other allegations of the complaint. Upon the trial, the court permitted respondents to amend by alleging the delivery of 971,213 feet of logs and an indebtedness of $485.60. This ruling was made at the commencement of the trial, before entering upon the taking of testimony, and over the objection of appellant. No suggestion of surprise was made by appellant upon the offer of the amendment, nor was any continuance or other relief asked for. Findings were made in favor of respondents, awarding them judgment in the sum of $485.59, and the lumber company appeals.

The errors claimed are, that there was no consideration for

the writing, the allowance of the amendment, and variance. Upon the first contention, appellant contends that, inasmuch as respondents had no right of attachment or lien upon the logs, there was no consideration. It is not necessary for us to decide whether there was any right of attachment or lien, as the consideration of the writing does not depend upon the existence of any such right. There was ample consideration irrespective of any such right. Respondents forbore taking steps to collect the account as it then existed, either by suit or otherwise. They continued furnishing supplies to Kelly, which they would not otherwise have done. Kelly secured an extension of credit, and was thereby enabled to continue his logging operations, which otherwise he could not have done. Continuing his logging operations, he was able to supply the appellant with logs, a beneficial inducement moving directly to appellant, as well as to Kelly. Thus, all three of the interested parties received a benefit because of the agreement. These considerations, and others that might be suggested from the nature of the transaction, furnished ample consideration to support the writing. 9 Cyc. 342 *et seq.*; *Staver and Walker v. Missimer*, 6 Wash. 173, 32 Pac. 995, 36 Am. St. 142; *Kelley v. Greenough*, 9 Wash. 659, 38 Pac. 158; *Hutchinson v. Mt. Vernon Water & Power Co.*, 49 Wash. 469, 95 Pac. 1023; *Malone v. Crescent City M. & T. Co.*, 77 Cal. 38, 18 Pac. 858.

In this connection, appellant contends there was no absolute agreement to pay, and that the writing is too uncertain and wanting in mutuality. The agreement contained an absolute promise to pay fifty cents per M on the scale on each raft of logs. It was an original undertaking on the part of appellant to pay this amount, until such time as it notified respondents it would cease such payment. The court finds no such notice was ever given. Until the notice was given, respondents had a right to assume that appellant held itself liable. There was no error in the allowance of the amendment. Our statute providing for amendment of pleadings is very

liberal, and the court was clearly within its provisions in permitting respondent to amend.

There was no variance. The cause of action alleged was the cause proved. There was no difference between the pleading and proof, except as to the increase in the number of logs furnished appellant and the consequent liability at fifty cents per M. In order to establish a variance, there must be an essential difference to the prejudice of a party in making his defense. There could be none under such circumstances. It would not prejudice appellant to inform it of the number of logs furnished it by Kelly. Such was undoubtedly then within its knowledge, and we fail to see how it could have been misled. There is no uncertainty about the writing. Appellant plainly confesses a liability to the extent of fifty cents per M on all logs furnished by Kelly, until notice to the contrary should be given. There was no lack of mutuality. The writing induced all parties to the transaction to do something in reliance upon its terms. Appellant furnished supplies. Kelly continued logging and supplying logs to appellant. Appellant received its benefit in the receipt of the logs from Kelly. The writing itself does not purport to indicate anything other than appellant's undertaking, but under the circumstances of its execution, its purpose and its effect, it could not be subject to a charge of lack of mutuality.

Judgment is affirmed.

RUDKIN, C. J., CHADWICK, CROW, and DUNBAR, JJ., concur.

[No. 9021. Department Two. December 21, 1910.]

ANNIE BIRRELL, *Appellant*, v. GREAT NORTHERN RAILWAY COMPANY, *Respondent*.[1]

MASTER AND SERVANT—INJURY TO SERVANT—RAILWAY YARDS—CONTRIBUTORY NEGLIGENCE—EVIDENCE — SUFFICIENCY. A dining car conductor is guilty of contributory negligence, precluding any recovery for his death, where it appears that he was familiar with the situation in a passenger yard where trains were constantly moving, and in the nighttime left a well known path between tracks, six feet wide from tie to tie, making a safe space of six feet, and took a walk along the edge of a swamp near the outer ties, where the safe space was only two and one-half feet, and was in consequence struck and killed by a switch engine.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 20, 1910, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for wrongful death. Affirmed.

E. P. Dole, for appellant.

F. V. Brown and *Frederic G. Dorety*, for respondent.

MORRIS, J.—Appellant is the widow of J. W. Birrell, who was killed by being struck by an engine of the respondent company, on December 26, 1909, and brings this action to recover for such death. Upon the trial below, the court directed verdict and judgment for defendant, and plaintiff appeals.

The accident occurred in the railway yards at Seattle. Deceased was a dining car conductor, and had been directed to exchange cars with another conductor named Chapman. They finished checking up their cars, which were lying in the coach yards about one-quarter of a mile south from the union depot, and having received the O. K. of the commissariat office, started north through the yards to reach the exit at the depot. It was then about seven o'clock in the evening, and dark. As they walked north, they proceeded along what is known as the

[1]Reported in 112 Pac. 362.

six-foot path, being a space between the two main tracks, six feet wide from tie to tie. In the middle of this path about every one hundred feet was a switch stand, which showed different colored lights at night, indicating to the engineers of incoming and outgoing trains the condition of the numerous switches or tracks running from the main track.

Deceased and Chapman had proceeded but a short distance on this path when a passenger train south bound left the depot and passed them on the left or west track. They knew that trains were due to arrive and depart at about that time, and they concluded between themselves that this six-foot path was too dangerous, and that it would be safer to turn to the right, cross the east track, and walk north along a path running at the east of this track. To the right of this track was a marsh, wet and muddy, to which the ground on the east slopes, the path being on the top of the slope and about two feet wide, and the same distance from the track to its outer edge. From this path the ground slopes sharply to the marsh. The ties extended about a foot or a foot and a half beyond or outside of the rails, so that this path was from six to twelve inches wide outside the ties. It was not lighted. They had proceeded about fifty yards, walking side by side, Chapman along the slope and deceased upon the path, when suddenly Chapman says he felt something brush his shoulder and saw Birrell thrown under a switch engine which had approached from the south without warning of any sort, and that he neither heard the sound of its approach nor saw any flash or showing of headlight along the track. There was testimony to the effect that this path was much used by employees leaving the yards, and that it was regarded as a safe way. Chapman further testified that the switch engine proceeded about two lengths after striking Birrell, when it stopped, and the engineer came back and said he did not see anybody upon the track, and that he was "firing at the time."

Deceased had been running out of Seattle for about three months, returning every fourth day, and remaining some

thirty-two hours before again taking his run. Upon each of these occasions he would walk through this same yard in leaving and returning to his car. It also appeared in the testimony that "there are local trains going in and out, and also two through trains around about that time," and that switching engines "are running all the time, . . . they have to work night and day . . . and are running backwards and forwards there all the time . . . working up and down the yards all day and all night." These are the main facts upon which the court below adjudged deceased guilty of contributory negligence, and upon which the ruling appealed from is predicated.

In determining the question of contributory negligence, it is difficult to announce a rule which will alike fit all cases. As is said in *Keefe v. Seattle Elec. Co.*, 55 Wash. 448, 104 Pac. 774, cited by appellant, negligence is a relative question, and the conduct of deceased must be measured with the line of ordinary prudence. "The facts declare the law in such cases," and "it all comes down to the question of ordinary care under the given circumstances," and "it is only when . . . the situation as to negligence is so plain, clear and unequivocal as to admit of but one answer that the court may declare negligence as a matter of law." *Henry v. Seattle Elec. Co.*, 55 Wash. 444, 104 Pac. 776.

Applying these rules for the measurement of the conduct of deceased, to determine whether or not he acted as a man or ordinary prudence would have acted at such a time, in such a place, with such a knowledge of the conditions confronting him and to be anticipated, we can make but one answer, the same as made by the court below. The courts have said over and over, in deciding cases of this character, and it is the undoubted law, that men who know and appreciate the dangers of their surroundings cannot throw the entire burden of their safety upon others. Nature has given men senses to aid them in self-protection, and when, under such circumstances as we have before us, men refuse to em-

ploy or use such senses in their protection, they are guilty of such contributory negligence as to preclude a recovery in case of injury. Deceased and Chapman were in a place of comparative safety, upon a hard, dry, smooth-surfaced path, six feet wide from tie to tie, between two parallel tracks, having switch stands in its center line about one hundred feet apart, showing a light—a path familiar to them and doubtless often traveled, the path which naturally would suggest itself as the path to reach the exit. This is apparent from the fact that they took this path without any discussion as to the proper path to take, and it did not occur to them that it was dangerous until the train passed them on the west track going south.

Chapman testifies that the ordinary engine would extend a foot and a half over the rails; switch engines still further. That would be about the distance of the ties beyond the rails, so that if two trains should pass each other, a person walking on this path would have a safety zone approximately six feet wide, with its center line fixed by the lights of the switch posts. If such a path suggested danger to deceased because of the frequent passing of trains or switch engines on its parallel tracks, what greater safety could there be in the path chosen in its stead, approximately six inches wide beyond the end of the ties which extended from one foot to a foot and a half beyond the rail, giving a space two feet wide on top, then sloping sharply to the water, with no lights to guide one? If there was danger in the six-foot path from passing engines, because of the extension of the engine beyond or over the rails, it is difficult to see how there could be less danger walking on this second path, upon a space two feet wide, with a companion closely upon the right, walking upon the slope to the marsh, and the track closely upon the left, a space that must necessarily be swept by any passing engine; and then walking on with, so far as this record shows, no look to the rear to discover the possible approach of "local trains going in and out, and also through trains around about that time,"

or of switch engines "running backwards and forwards there all the time . . . up and down all day and all night." To voluntarily leave a place of comparative safety (although it is apparent that there was, either night or day, no place of safety in that yard, except to the person using due care and caution) and take a position of apparent danger, has of itself often been declared such contributory negligence as will defeat recovery. Such rule, while authoritative, is not controlling here, as the negligence of deceased is to be attributed to his lack of caution and prudence as he proceeded along the east track, without taking any precaution for his safety, as much if not more than in leaving the six-foot track. Even to a stranger, the presence of the track itself was a warning of danger, suggesting care to escape being struck by passing trains; and it has been often held that one who deliberately walks along a railroad track, without making use of his senses to apprise him of danger, is guilty of negligence. *Denver & R. G. R. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582; *Missouri Pac. R. Co. v. Moseley*, 57 Fed. 921; *Gulf C. & S. F. R. Co. v. Wilkins* (Tex. Civ. App.), 32 S. W. 351; *Neal v. Carolina Central R. Co.*, 126 N. C. 634, 36 S. E. 117; *Spaven v. Lake Shore & M. S. R. Co.*, 130 Mich. 579, 90 N. W. 325; *Davis v. Boston & M. R. Co.*, 70 N. H. 519, 49 Atl. 108.

In the *Neal* case, *supra*, the court says:

"We know that it has been held in many cases that a railroad company is liable for damages for carelessly and negligently running over and killing or injuring persons on its road, in which it appeared that the persons killed or injured were also guilty of negligence, and it may not be easy to distinguish some of these from the one under consideration. But there is a distinction . . . . and we think upon examination that it will be found that where the company has been held liable, it is in cases where the party injured was not upon equal opportunities with the defendant to avoid the injury, and in cases where there was something suggesting to the defendant the injured party's disadvantage."

The advantage, if any here, was with the deceased. He knew the switch engines were upon the track, constantly passing up and down. The engineer of a switch engine would have no reason to anticipate any one in the yard, or in such close proximity to the track as to be injured by the passing engine, except the employees of the railway companies, who knew the danger of the situation and would take due care to protect themselves. This distinguishes this case from *Averbuch v. Great Northern R. Co.*, 55 Wash. 633, 104 Pac. 1103, relied upon by appellant. That was a crossing case, where the advantage of the situation was in favor of neither party, and where there was evidence that the plaintiff could not see the approaching train by reason of intervening obstacles, the question of negligence in approaching the crossing being for the jury where each party was equally bound to anticipate the presence of the other. Neither can appellant rely upon *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 31 L. R. A. 855, as the ruling there, in so far as it touches the question of contributory negligence, is based upon the fact that the injured child was of tender years and not held to the same degree of care as an adult. The same is true as to *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820.

The same reasoning which establishes the negligence of the respondent fixes the negligence of the deceased. If it was negligence for the engineer to run his switch engine without keeping watch ahead to guard against striking pedestrians, whom he had reason to anticipate might be walking upon this path, it was equally culpable and negligent for deceased to walk along the track as he did, without taking heed of the presence of switch engines. The same situation presented itself to both deceased and the engineer. If the one must take heed of men walking along or upon the track, the men so walking must take heed of the switch engines. That one walking along the track in such close proximity to the rails as to be struck by passing trains, without taking precaution for his

safety, is guilty of contributory negligence, is established by many authorities. *Heffinger v. Minneapolis, L. & M. R. Co.*, 43 Minn. 503, 45 N. W. 1131; *Gulf C. & S. F. R. Co. v. Wilkins, supra; Tucker v. Baltimore & O. R. Co.*, 59 Fed. 968; *Scott v. Pennsylvania R. Co.*, 130 N. Y. 679, 29 N. E. 289; *Holmes v. Southern Pac. C. R. Co.*, 97 Cal. 161, 31 Pac. 834; *Hill v. Indianapolis & V. R. Co.*, 31 Ind. App. 98, 67 N. E. 276; *Mizzell v. Southern R. Co.*, 132 Ala. 504, 31 South. 86; *Sharp v. Missouri Pac. R. Co.*, 161 Mo. 214, 61 S. W. 829; *Aerkfetz v. Humphreys*, 145 U. S. 418, and many others. Thompson on Commentaries on the Law of Negligence, § 1796, sums up the rule in this language:

"Standing or walking so near the railway track as to be struck by a passing engine or train, or as to be drawn under the wheels by the atmospherical suction made by the train when in full motion is an act of folly of pretty much the same nature as standing or walking upon the track itself, and the courts, with great uniformity, characterize it as contributory negligence such as will prevent a recovery of damages by the person so injured, or by his personal representatives if he is killed."

Such is the rule in this state: *Baker v. Tacoma Eastern R. Co.*, 44 Wash. 575, 87 Pac. 826, where the deceased when struck was crossing a track in a locality similar to the one here, having many tracks upon which engines were constantly passing and repassing; *Anson v. Northern Pac. R. Co.*, 45 Wash. 92, 88 Pac. 1058, where the plaintiff was walking near the track and was struck by a passing engine; *Raines v. Great Northern R. Co.*, 53 Wash. 570, 102 Pac. 431, where a fireman was cleaning out his engine on a side track, standing so near the main track that he was struck by a passing engine. *Woolf v. Washington R. & Nav. Co.*, 37 Wash 491, 79 Pac. 997.

Counsel for appellant says Birrell was not a railroad man, but a caterer; that he was not a trespasser, nor a licensee, but was using the railroad right of way as a way of necessity. So far as the facts before us are concerned, this is immaterial.

We see no distinction in determining which of the above terms correctly defines the deceased. He was there; he knew the local situation; he knew he was in a position of great danger, calling for the exercise of caution and prudence on his part. He did not exercise such caution and prudence, and his failure to do so defeats recovery.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, CROW, and DUNBAR, JJ., concur.

[No. 9006. Department Two. December 22, 1910.]

ALICE COX *et al.*, *Respondents*, *v.* WILKESON COAL & COKE COMPANY, *Appellant*.[1]

MASTER AND SERVANT—COAL MINE—SAFE PLACE — ASSURANCE OF FOREMAN. After an unsuccessful attempt to cause a "squeeze" in a coal mine, the assurance of the foreman, after inspection, that the place was safe, is an undertaking of the master and may be relied upon by miners called to the place.

SAME—DUTY OF MASTER—TRIAL—INSTRUCTIONS—HARMLESS ERROR. It is not prejudicial error requiring a reversal of the case that the duty of the owner of a coal mine was defined by reference to what "could" have been done instead of what "should" have been done to render the place safe, where the true tests were given in other instructions and it does not appear that the jury were misled.

SAME—NEGLIGENCE—EVIDENCE—ADMISSIBILITY. In an action for the death of a coal miner, caused by a cave-in after an unsuccessful attempt to draw a pillar, it is not error to admit evidence that pillar drawing is the most dangerous work in the mine, or that it would have been safer to discontinue work at that place for a time.

DAMAGES — PERSONAL INJURIES — EXCESSIVE VERDICT. A verdict of $16,500, reduced to $14,000, for the death of a coal miner, thirty-five years of age, who was industrious and thrifty, is not excessive.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered February 19, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an

[1]Reported in 112 Pac. 231.

action for damages for the wrongful death of an employee in a coal mine. Affirmed.

Hudson & Holt, for appellant.

Fitch & Jacobs, for respondents.

MORRIS, J.—The facts, in so far as they are pertinent to the appeal herein, are as follows: On March 12, 1908, J. H. Cox, husband and father of respondents, was at work in appellant's mine, in what is known as pillar No. 119. He had with him a working partner named Hudson. The method used in working the mine was to run vertical breasts which would be intersected by crosscuts, dividing the coal into large blocks. The line of blocks between any two breasts was called a pillar. The coal is taken out as quickly as it can be done, and its place is supplied by props and cogs which support the roof. After the coal is taken out, it is expected that the roof will shut down and close up the space from which the coal was removed. This closing in of the roof is called a "squeeze," and is usually a gradual one, depending somewhat upon the character of the deposit lying between the coal and the rock. A squeeze is generally foretold by falling rock or coal, in time to seek protection against it; although they are known to occur without any previous indication or warning. The miners in working the pillars start in at the upper corner of a block and take the coal off at an angle so it will fall into the breast. They leave the rear end of the block for the time, and this is known as the "tail." The tail in block 119 extended from crosscut No. 6 to crosscut No. 7, and was about four feet wide.

The day before the accident, the foreman of the mine observed that no squeeze had taken place for some distance in pillar No. 119, and that it was open up to crosscut No. 9. Knowing there was danger of a cave-in, he considered it prudent to draw the tail of the block between crosscuts 6 and 7, in order to bring about a squeeze. He discussed the matter with Cox and Hudson, and it was understood that it should

be done, and a squeeze produced. Next morning Cox was told by the assistant foreman to wait before going to work and he would come up and draw the tail, which it was expected would bring about the squeeze. The holes were bored, filled with dynamite, and the fuse lighted by the assistant foreman and, accompanied by Cox and Hudson, he went into crosscut No. 6, pillar 120, where they would be safe until the shot had exploded and the expected squeeze followed, which it was anticipated would occur, if at all, in about twenty minutes. They remained in crosscut No. 6 about twenty minutes after the shot had been fired, when the assistant fireman went up among the props and cogs to note the effect of the blast. The tail had not run out, but was apparently blocked on top of the cog underneath crosscut No. 6. He says he saw no indication of a squeeze. He then came back and waited in the crosscut for a short time, when hearing no indication of a cave-in, he went down below into the pillar between crosscuts 5 and 6, and commenced putting in a battery, an arrangement of planks under the open space of the tail to protect the men from falling rock, as he expected a squeeze. He then called Cox and Hudson to come, telling them "it was all right; them cogs were all right." They came in response to his call, and had been there but a few minutes, when a large cave-in took place, and in falling swept away the props and hurled a large mass of rock down into the pillar where the men were, killing Cox. The action was brought, alleging negligence in failing to make the place reasonably safe, and a reliance upon the assurance of the assistant foreman that the place was safe. There were other allegations of negligence, but they are not material to our view of the case. Verdict was returned for $16,500, which was reduced by the court, and judgment entered for $14,000, and the company appeals.

The errors assigned are in denying appellant's motion for judgment, and new trial, in the admission of testimony, and in the instructions. There was ample proof of negligence to sustain the judgment. When the assistant foreman undertook to

ascertain the condition of the place as to its safety after the shot had been fired, he was undertaking the master's duty. In calling to Cox and telling him that the place was safe, it was an assurance of safety upon which Cox had a right to rely. It was made upon and after an inspection of the conditions, and Cox could rely upon the sufficiency of the examination and the truthfulness of the result. If Cox had suspicions of danger, he was not free to act upon them. He had been called by one in authority over him, and told the place was safe. It was his duty to obey the call, and in so doing he could rely upon the safety of the place to which he was called. He was not required to then make a critical examination. The assurance of the foreman was sufficient for his protection in law. *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 121; *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498; *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 104 Pac. 801. Labatt, Master & Servant, § 440. There was, therefore, no merit in appellant's motion for judgment. The alleged vice in the instructions consists in the use of the word *could* in saying to the jury:

"You should not render a verdict against the defendant in this case because the place of work was unsafe, unless you find from the evidence that the employer could have taken some action which would have rendered the place more safe, and unless you find that such action would have been taken by a reasonably prudent employer.

"In regard to the method of work, you are to consider the method of work with reference to the conditions at the place where the work was being done. If at the place where the work was being done the method used by the employer was as safe as any other that could have been used, it would be your duty to find that the employer was not negligent with reference to the method of working."

It is true that the test of appellant's liability in this connection is what the reasonably prudent man, not *could*, but *would* have done under similar conditions; and the use of the word "could" in this connection was unfortunate, although

the proper qualification is given in the first two instructions. Appellate courts, however, are not justified in reversing judgments because of the use of an improper word in an instruction, unless it is apparent that its use would mislead or confuse the jury, and we have often held, as have other jurisdictions, that where the rules and tests of liability are correctly given to the jury by the court, the instructions will be read as a whole; and no error will be found because of the use of an improper word in one or more instances unless prejudice is apparent. We have examined each of the instructions given, and find the court in correct language defining the liability of the appellant and giving the true tests for determining negligence, as defined in the following instruction:

"In determining the question as to whether the defendant or its foreman was negligent, I instruct you that the way to determine whether a man has been negligent or not is to compare what was done by such person—or left undone by him—with what would have been done or left undone by a man acting with ordinary prudence. If a man acts as an ordinarily prudent man would act under the same circumstances and conditions, there is no negligence. If a man fails to act as an ordinarily prudent man would under the same circumstances and conditions, there is negligence."

This was a clear, apt expression of the true rule, and one which the jury could readily understand and easily comprehend. In another instruction the court told the jury "it was the duty of the master to see that the mine was properly timbered, and if you should find from the evidence that there were safe and unsafe ways of timbering the mine known to the defendant, then it became the duty of the defendant to adopt the safe way;" and if the safe way was not adopted and would have been with reasonable prudence, the defendant was negligent. Counsel for appellant critically analyze this instruction, and think they find a possibility of an erroneous meaning. We see no error in it, and think its meaning clear and capable of comprehension by the jury.

Coming to the testimony, respondents were permitted to

show that pillar drawing was the most dangerous work in the mine. We think appellant's objection to this testimony is more refined than real. We see no error in it. There was also testimony to the effect that it would have been safer to have left the tail of the pillar in place and gone elsewhere and mined, when it was discovered that the top was loose. We do not see the relevancy of this testimony, but can see no prejudice to appellant in its admission.

The next complaint is of the size of the judgment. The deceased was thirty-five years of age, earning fair wages, and had accumulated two lots, a house and a two-acre piece of land in Puyallup. He was evidently industrious and thrifty, and we can find no reason to disturb the verdict.

Judgment affirmed.

RUDKIN, C. J., DUNBAR, and CROW, JJ., concur.

CHADWICK, J., concurs in the result.

[No. 8882. Department One. December 23, 1910.]

JAMES LYON, *Respondent*, v. O. M. SPARKS *et al.*, *Appellants*.[1]

CONTRACTS — BOARD AND SERVICES — VALUE — QUESTION FOR JURY. The reasonable value of services and board furnished at a boarding school is for the jury, where there was evidence supporting the defense that the food was insufficient in quantity and some of it unfit to be eaten; and it is error for the court to direct judgment for the plaintiff.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 14, 1909, in favor of the plaintiff, upon withdrawing the case from the consideration of the jury at the close of the evidence, in an action on contract. Reversed.

[1]Reported in 112 Pac. 340.

Gleeson & Morton, for appellants.

E. L. Edmiston, for respondent.

PER CURIAM.—Respondent brought this action to recover for the value of services rendered at the instance of the appellants, O. M. Sparks and wife. The cause was tried to a jury. At the close of defendants' evidence, the court directed a judgment in favor of the plaintiff for the amount prayed for in the complaint. The defendants appeal.

It appears that Professor Saylor and wife were conducting a boarding school for boys in Spokane. A statement in the form of a catalogue had been issued, which contained the terms upon which boys would be cared for, as follows:

"Board, tuition and personal care, $400 for the school year; payable one-half at the entrance and one-half January 20. A reduction of $30 to parents paying the whole school year in advance. Also reduction of ten per cent for brothers. Bills not promptly paid subject to sight draft. No reduction for premature withdrawal. Washing fifty cents per dozen. A deposit is required to keep up incidentals. An itemized account will be rendered."

Two boys of the appellants entered the school about the first of September, 1908. They remained until the following December, when one of the boys was discharged and the other was taken away from school. The appellants did not make the payment in advance. They made no deposit for incidental expenses. Professor Saylor advanced to the boys while they were in his care $39.78, for laundry and incidental expenses. After the boys were taken away, the appellants neglected and refused to pay for the time the boys were in school, or to reimburse Professor Saylor for the money he had advanced. The claim was assigned to the plaintiff, who brought the action to recover for the value of the services, alleged to be $288.85, and the money advanced, making a total of $327.63.

The answer of the defendants admitted that the boys were in the school for the time alleged, but denied that defendants

were indebted upon the claim; and as an affirmative defense alleged that the food furnished to the boys was impure, unwholesome and unfit to be eaten, and that the defendants had been damaged in the sum of $1,000 thereby. This affirmative defense was denied. Upon the trial of the cause, Professor Saylor testified to the facts substantially as alleged in the complaint. The only defense offered by the appellants was evidence to the effect that the food furnished to the boys was insufficient in quantity, and that some of it was unfit to be eaten. After this testimony was introduced, the respondent moved the court to discharge the jury and render judgment for the plaintiff. This motion was sustained, and the court entered a judgment for the plaintiff for the full amount claimed.

We have no doubt that the respondent was entitled to a judgment for the reasonable value of the services rendered to the boys, but the jury should have passed upon that question under the facts testified to. If the food furnished to the boys was in fact insufficient and unwholesome, the services were no doubt worth less than if the food was wholesome and abundant. The court was not justified, we think, in taking this question away from the jury.

The judgment is therefore reversed, and the cause remanded for a new trial.

[No. 9084. Department One. December 27, 1910.]

JOHN HALL, *Respondent*, v. NORTHWEST LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—INJURIES — NEGLIGENCE — SIGNALS — SAFE PLACE. It is actionable negligence for the foreman of a log loading crew to give the signal for the starting of the winch before the tong tender had time to get out of the way of the log to which he had attached the tongs for the purpose of loading it onto a car.

MASTER AND SERVANT—VICE PRINCIPAL—FOREMAN—DUTY OF SUPERINTENDENCE. A foreman of a log loading crew, where the work requires concert of action under immediate and direct supervision, is a vice principal and not a fellow servant of the other members of the crew as to the duty of superintendence delegated to him by the master.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a tong tender was guilty of contributory negligence in not placing the tongs in the proper position on the log to be moved, is for the jury, when that was a disputed question.

APPEAL—OBJECTIONS—ADMISSION OF EVIDENCE. Error cannot be predicated on the admission of evidence unless the specific objection urged was made at the trial.

TRIAL—INSTRUCTIONS—REQUESTS. It is not necessary that instructions be given in the language requested, where the same were fairly presented.

TRIAL—MISCONDUCT OF JUDGE. Remarks of the trial judge during the course of the trial are not ground for reversal, where they could not have been prejudicial.

APPEAL—MISCONDUCT OF JUDGE—TRIAL—POLLING JURY. It is not prejudicial error, in polling a jury, for the court to make additional inquiries as to how each juror found on certain questions.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for ten thousand dollars for personal injuries through the breaking of a leg is not excessive, where the broken bone did not unite after two operations, the plaintiff was only twenty-three years of age, and cannot work in a standing position.

COSTS—WITNESS FEES—MILEAGE. Mileage for witnesses may be first claimed in the cost bill, although the witnesses did not claim the same in reporting their daily attendance to the court.

[1]Reported in 112 Pac. 369.

COSTS—DISBURSEMENTS—INTERPRETER'S FEES. The reasonable fees of an interpreter are properly allowed as disbursements, when necessarily incurred.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 18, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a logging camp. Affirmed.

John P. Hartman and *Byers & Byers*, for appellant.

Brady & Rummens, for respondent.

FULLERTON, J.—The respondent was injured while employed in the logging camp of the appellant, and brought the present action to recover therefor. There is no substantial dispute in the record as to cause of the accident. The appellant was engaged in bringing logs in from the woods and loading them on cars. In the operation, it made use of two distinct apparatuses, the first of which was known as a Lidgerwood skidder. This consisted of a wire cable stretched from the loading place into the woods over which was operated the skidder proper, the skidder being a couple of sheave wheels fastened in a frame in such a manner as to roll on the wire cable while carrying a weight swinging below. The method of drawing logs in from the woods was to fasten one end onto the skidder, hoist it up sufficiently high to clear obstructions, and then draw it in to the loading place by means of a cable operated by a steam winch. The second apparatus was used for loading the logs. It consisted of a pulley fastened to supports directly over the railway track, through which was run a wire cable leading from the drum of another steam winch. The end of the cable passing through the pulley was fastened to a pair of hooks, locally known as tongs. These tongs would be fastened into a log, which would be lifted from the ground onto the railway cars by means of a pull on the cable by the steam winch. The loading crew consisted of the winchman, the loader, and the tong tender; it being the

duty of the last named to fasten the tongs into the logs preparatory to lifting them onto the cars.

The work of the logging camp was under the direction of one Dan Williams, and on the day of the injury he was superintending the loading of the cars. After two cars had been loaded and the third one almost finished, Williams directed the respondent to hitch onto a log some forty feet in length that lay some little distance back from the overhead pulley in the line of the path of the skidder that brought the logs in from the woods. The respondent gathered up the tongs and proceeded towards the log pointed out, and had nearly reached it when he noticed the skidder coming in from the woods dragging a log. It was almost upon him, and he hurriedly fastened the tongs and sought to escape by running in the direction of the railroad track, at right angles to the track of the approaching log. Just as he started, Williams gave the signal to pull away on the log to which the tongs were hooked. The winchman obeyed the signal, starting the log somewhat quickly. Instead of the log pulling straight out as was expected, the front end caught on a stump, which caused the other end to swing around in the direction the respondent was endeavoring to make his escape. The log struck him before he could get beyond its reach, the blow breaking the femur of his left leg and otherwise injuring him. At the trial the jury returned a verdict in his favor for ten thousand dollars, and judgment was entered for this sum. This appeal was taken therefrom.

The assignments of error first to be noticed relate to the sufficiency of the evidence; it being contended that the evidence fails to show any negligence on the part of the appellant which was the proximate cause of the injury. But we think negligence was clearly shown. It lies in the foreman's act of starting the haul on the log before the respondent was out of the zone of danger. No doubt it was the foreman's desire to get the log out of the way of the incoming log

brought by the skidder, but from its position he ought to have forseen that it was liable to catch upon some one of the intervening stumps and swing around to one side or the other. Common prudence dictated that he should have waited until the respondent was clear of the swinging end. At least these were questions for the jury, and were properly submitted to them by the court.

But it is said that it was no duty of the master to superintend the work in which the respondent was engaged, and hence, when the foreman undertook to direct the work, his acts were but those of a fellow servant for which the master is not liable. But the work was of such a character as to require concert of action on the part of the several workmen engaged in its performance, and could not proceed with any degree of efficiency without the immediate and direct supervision of someone. When the master, therefore, took the burden upon itself of selecting such a supervisor, it became responsible for the acts of the person so selected, and if he performed his duties negligently, it became responsible to any one injured by such negligent performance. *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376; *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25; *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400.

What might have been the rule had the master employed the men and directed them to do the work required in any manner they saw fit, and they had chosen their own supervisor, we need not inquire. But where the master employs the men as laborers merely, reserving to himself the right to superintend and direct their work and the manner in which they shall perform the work, he becomes liable for a negligent performance of the duty of superintendence, no matter whether he undertakes to perform the duty individually or entrusts it to another. In such a case the person so selected is the master's representative, not the representative of the servants.

It is next insisted that the respondent was guilty of con-

tributory negligence. It is assumed that the tongs were not placed in a proper position upon the log it was intended to haul, and that the accident was the result of their improper placement. But this was a disputed question, and as such, for the jury.

The appellant next objects that certain X-ray photographs of the respondent's injured leg were admitted in evidence without sufficient identification. But an examination of the objection made by counsel to their introduction, made at the time they were offered, does not include this specific objection. They were clearly admissible as against the objections made to their introduction, and error cannot be predicated in this court on objections not suggested to the trial court.

It is further objected that the court erred in refusing to give certain instructions requested by the appellant. On the trial of the cause it was sought to show in defense of the respondent's action that one Dan Williams and not the appellant was operating the logging camp in which the respondent was injured, and that he, if any one, was responsible for any injury received by the appellant. Certain instructions were asked presenting this question to the jury, which the court gave in a modified form. The modification consisted in stating more fully to the jury the matters to be considered by them in arriving at their verdict than were contained in the requested instructions. But we find nothing in the modification made that is improper. The appellant's contention was fully and fairly presented. This satisfied the rule. As we have often said, it is not necessary that the court give to the jury a requested instruction in the language in which it is presented; it is sufficient if the instruction is given in substance.

The appellant complains that it was prevented from having a fair trial because of certain remarks made by the judge during the course of the trial. But an examination of the record leading up to them convinces us that they could not have been prejudicial. They were, with the exception of one or two instances, pertinent to the matter under consideration;

the only fault that can be found with them being that they were couched in language somewhat redundant and not at all times very well chosen. Those that seem to have no pertinency to the particular matter in hand seem to us also to be without prejudice; the one thought to be most flagrant being a question asking if certain counsel, whose names appeared in the pleadings, were not the general attorneys for an officer of the appellant. This is thought to be prejudicial because certain other attorneys who appeared for the appellant were regularly employed counsel of a surety company and that the inquiry tended to make that fact known to the jury, but clearly, there is no justification for this inference.

On polling the jury after they had returned their verdict, the trial judge inquired of each juror not only concerning the verdict returned, but how he found on certain questions presented necessary to be passed upon in order to arrive at the verdict returned. It is complained that this was error, but we think otherwise. It was perhaps unnecessary to ask the several jurors anything more than the single question, "Is this your verdict," but it could not be so far prejudicial to the appellant as to require a reversal to make additional inquiries. *Norman v. Hopper*, 38 Wash. 415, 80 Pac. 551.

It is objected that the verdict is excessive. It is large, but the respondent's injuries are great. There has been no union of the broken bone, although he has submitted to two operations, one of which consisted in wiring the ends of the bone together in an effort to make them unite, and the experts differed as to the probability of its ever being in any better condition than it now is. Moreover, the respondent was only twenty-three years of age when the injury occurred, and is incapacitated from following any pursuit in life that requires a standing position. Under these circumstances we cannot think the verdict excessive.

The court allowed as disbursements certain mileage for witnesses who did not make a claim for the same to the clerk when reporting their daily attendance, and certain fees paid

an interpreter. The statute relating to the necessity for claiming mileage, in order to enable a party to recover the same, is somewhat obscure, but we think it may properly be claimed for the first time in the cost bill. The fees of the interpreter, in so far as they were reasonable, were clearly taxable as part of the respondent's disbursements. He was compelled to pay them in order to obtain the testimony of his witnesses, and has a right to their return.

The judgment is affirmed.

RUDKIN, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9129. Department One. December 29, 1910.]

SPOKANE CANAL COMPANY, *Respondent*, v. HENRY M. COFFMAN *et al.*, *Appellants*.[1]

FRAUDS, STATUTE OF—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR. An oral contract whereby a vendor agreed not to declare a forfeiture of a contract to purchase land for five years, if the vendee would plant and cultivate an orchard and remain on the land, is void under the statute of frauds requiring contracts not to be performed within one year to be in writing.

EVIDENCE—PAROL TO VARY WRITING—CONTRACTS—MODIFICATION. A written contract to convey land, fixing the time for payments, with provisions for forfeiture, cannot be varied by parol proof of a modification whereby the vendor agreed not to declare a forfeiture for five years if the vendee would plant and cultivate an orchard and remain on the land.

VENDOR AND PURCHASER—CONTRACTS—DEFINITENESS—MUTUALITY. An agreement by a vendor not to declare a forfeiture of a land contract for five years, if the vendee would plant and cultivate an orchard and remain on the land, and if the land was not then paid for to take pay in fruit growing thereon, is void for indefiniteness and lack of mutuality, the vendee being under no obligation to remain on the land or to pay for it at any definite time.

[1]Reported in 112 Pac. 383.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 4, 1910, in favor of the plaintiff, after a trial before the court without a jury, in an action on contract. Affirmed.

John M. Gleeson and *Joseph F. Morton*, for appellants.

Happy, Winfree & Hindman, for respondent.

MOUNT, J.—This is the second appeal in this action. When the case was here before upon the appeal of the plaintiff in the action, the judgment was reversed and the cause remanded for further proceedings. *Spokane Canal Co. v. Coffman*, 54 Wash. 645, 103 Pac. 1106. In the opinion, we said:

"The record shows that they [respondents at that time] are still in default under the contract, and unless a new contract has been entered into, extending the time of payment, or waiving all payments past due, appellant is clearly entitled to a judgment of rescission and for possession of the land."

When the case was remanded, the defendant filed an amended answer by which the contracts were admitted, as alleged in the complaint, and an attempt was made to allege a new contract and waiver of payments past due and to become due. The amended answer alleged the new agreement as follows:

"Plaintiff company then and there informed these defendants . . . that if said defendants would remain on said premises and cultivate the same and set out an orchard on said premises, that no forfeiture would be demanded or claimed under said contract, or either of them, by reason of the failure of defendants to pay said monthly payments, or the taxes on said lands for a period of five years, if such there was, to wit, the time necessary to grow an orchard on said lands, and that at the end of said five years, if the said defendants had not previously paid for their lands, that there would be a superabundance of fruit growing on said lands by reason of the cultivation of said orchard by said defendants to pay for same."

It is not alleged that this waiver or new contract was made in writing. At the trial the defendants offered to prove that the contract was made orally, and that in pursuance thereof defendants remained on the land, and planted the same to trees and shrubbery and improved the same to the value of $8,000. The trial court was of the opinion that this alleged modification was, in effect, an attempt by parol evidence to vary and modify the terms of a written contract, and also that the contract was one which is required to be in writing, and was within the statute of frauds, and for these reasons sustained objections to the offered evidence.

We think the court was right upon both grounds. The contract was one which was not to be performed within a year, and under the statute was void unless in writing. The original contracts were in writing. There is no contention about that fact. But it is now claimed that the time and manner of payment were subsequently changed by oral agreement. The rule is elementary that the terms of a written contract may not be varied or contradicted by parol. The rule is stated in *Bradley v. Harter*, 156 Ind. 499, 60 N. E. 139, as follows:

"It is true that the consideration for the sale of real estate, even as between the parties to the written contract, may be shown by parol, when such consideration is not of itself contractual within the terms or provisions of the written instrument; but when a written contract affected by the statute, stipulated, fixes, and provides for the payment of the consideration as was done under the written agreement in this case, the consideration, and the mode or manner of its payment, as therein fixed and provided, became a part of the contract, and the latter, as to these, is no more open to change or modification by parol than it is in respect to any other of its parts."

Under this rule, the trial court was right in rejecting oral evidence to thus modify and vary the terms of the admitted written contract.

Furthermore, if we assume that the contract alleged was an entirely new contract, and was taken out of the statute because there had been a part performance, still the contract was so indefinite and uncertain as to be void. The allegation is that, if the appellants would remain on the premises and cultivate the land and set out an orchard thereon, no forfeiture would be claimed for a period of five years; and at the end of this period, if the appellants had not paid for the land, then there would be an abundance of fruit growing thereon to pay for the same. In other words, there was no obligation on the part of the appellants to pay for the land within five years, and no definite time thereafter when payment should be made with fruit, and appellants were not required to remain upon the land or to cultivate it. The contract is entirely wanting, both in definiteness and in mutuality. In the case of *Dorsey v. Packwood*, 12 How. (U. S.) 126, where the purchaser of a plantation "bound himself to transfer to his son-in-law one-half of the plantation, slaves, cattle, and stock as soon as the son-in-law should pay for one-half of the cost of said property either with his own private means or with one-half the profits of the plantation," it was held that such a contract was deficient in mutuality. The court, in reference to the contract, there said:

"But there is one characteristic necessary to give it validity as a binding contract, in which it is entirely deficient. It wants mutuality. It imposes no obligation on Dorsey whatever. He is not bound either to render services or pay money as a consideration for one-half the land. Packwood could not support a suit upon it to compel Dorsey to do anything. He has not an alternative obligation, because Dorsey is not bound to perform either alternative."

The same is true in this case. If the contract was made as the appellants alleged and attempted to prove, there was nothing in it to bind them. They were neither required to remain upon the land nor to pay for it at any time. We are of the opinion, therefore, that the new contract alleged was

within the statute of frauds, could not be proved by oral evidence, and was also void for uncertainty.

The judgment is therefore affirmed.

RUDKIN, C. J., GOSE, FULLERTON, and PARKER, JJ., concur.

[No. 9166. Department One. December 29, 1910.]

THE CITY OF SPOKANE, *Appellant*, v. L. F. GILBERT *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—BENEFITS TO PUBLIC—REVIEW BY COURTS—POWER—HEARING. Under Rem. & Bal. Code, § 7790, eminent domain commissioners, upon assessing property benefited by a municipal improvement, must determine what proportion, if any, of the total cost will be of benefit to the public, and assess such amount to the city, and the balance to the property; and under Id., §§ 7795, 7796, upon appeal, the superior court may modify the assessment and adjust the assessments between the city and the property owners, and hear evidence thereon.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered April 11, 1910, upon findings in favor of the defendants, modifying an assessment roll made by commissioners upon property benefited by a public improvement, after a hearing before the court. Affirmed.

Fred B. Morrill and *Bruce Blake*, for appellant.

Cullen & Dudley and *Joseph Rosslow*, for respondents.

MOUNT, J.—In this case the city of Spokane, in the year 1906, instituted condemnation proceedings for a strip of land for a street, the purpose being to make Division street a continuous street between certain points. Theretofore, for a distance of two blocks, this street had not been dedicated, so that the street consisted of two parts disconnected by land which was owned by private parties. The city desired to lay three large water mains along this street, and it there-

[1]Reported in 112 Pac. 380.

fore became necessary to condemn the land for use as a street. The land was adjudged necessary as a public use, and damages for the taking were found in the sum of $8,075, in favor of the owners of the land. This amount was paid by the city, and a judgment of appropriation entered, to the effect that the city have and hold the land taken "for use as a public street of the said city". Subsequently a petition was filed, and an order made thereon appointing commissioners to make an assessment upon property specially benefited by the improvement, to pay the costs thereof. These commissioners, known as the board of eminent domain commissioners, made an assessment upon the property benefited, and returned the assessment roll to the court. No benefit was assessed to the city, but the whole cost was assessed against property in the vicinity of the improvement. Thereafter objections to the roll were filed by a large number of property owners whose land had been assessed. These objections came on to be heard, and the court found that the public was benefited to the extent of $3,000, which should be paid by the city, and that the balance should be paid by the property assessed by the eminent domain commission, and an order was made modifying the assessment roll accordingly.

The city appeals from that order, and makes two contentions as follows: "(1) That at the hearing upon the confirmation of the assessment roll, the court is bound by the judgment of necessity (and the ordinance upon which the action is based) in the original cause, as to the question of necessity and public use; (2) that the court is limited in its inquiry to the provisions of the statute relating to the manner in which such hearings shall be conducted." Respondent concedes the first position, which does not affect the result because there was no attempt to dispute the adjudication of public use or necessity for the street. Appellant's position upon the second contention is that, "if the property of the objectors was assessed proportionately in accordance to benefits from the improvement, and was not assessed more

than it was benefited thereby, then the assessment must stand as returned by the commissioners," and that the court is without jurisdiction to modify the assessment. The statute seems clear upon this question. It provides, at § 7790, Rem. & Bal. Code, as follows:

"It shall be the duty of such commissioners to examine the locality where the improvement is proposed to be made and the property which will be especially benefited thereby, and to estimate what proportion, if any, of the total cost of such improvement will be of benefit to the public, and what proportion thereof will be a benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall bear its relative equitable proportion, and having found said amounts, to apportion and assess the amount so found to be a benefit to the property upon the several lots, blocks, tracts and parcels of land, or other property in the proportion in which they will be severally benefited by such improvement."

This section makes it the duty of the board of eminent domain commissioners to estimate what proportion of the cost of the improvement will be of benefit to the public and what proportion thereof will be of benefit to the property, and apportion the cost between the city and such property. Section 7795, same volume, provides:

"The hearing shall be conducted as in other cases at law, tried by the court without a jury, and if it shall appear that the property of the objector is assessed more or less than it will be benefited, or more or less than its proportionate share of the costs of the improvement, the court shall so find, and also find the amount in which said property ought to be assessed, and the judgment shall be entered accordingly."

Section 7796 provides:

"The court before which any such proceedings may be pending shall have authority at any time before final judgment to modify, alter, change, annul or confirm any assessment returned as aforesaid, or cause any such assessment to be recast by the same commissioners, whenever it shall be necessary for the obtainment of justice, or may appoint other commissioners in the place of all or any of the commissioners first

appointed for the purpose of making such assessment or modifying, altering, changing or recasting the same, and may take all such proceedings and make all such orders as may be necessary to make a true and just assessment of the cost of such improvement according to the principles of this act, and may from time to time, as may be necessary, continue the application for that purpose as to the whole or any part of the premises."

These statutes clearly give the court power to adjust the assessment between the city and the property owner, so that each one may pay the proportionate share of the cost of the improvement. The court is not bound by the assessment made by the commissioners. In *In re Pike Street*, 42 Wash. 551, 85 Pac. 45, we said:

"The statute gives the court power to modify, change, alter or annul the assessment, and we think it may lawfully find that an improvement is of sufficient general benefit to make an appropriation of the cost a general charge against the municipality."

In order to do this, the court must necessarily hear and consider evidence bearing upon such question.

We find no error in the record, and the judgment is therefore affirmed.

RUDKIN, C. J., PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 8918. Department One. December 29, 1910.]

DAVID COLE, *Respondent*, v. HUNTER TRACT IMPROVEMENT COMPANY, *Appellant*.[1]

VENDOR AND PURCHASER—RESCISSION BY VENDOR—MISTAKE. Ignorance on the part of the vendor of residence lots of the fact that the vendee was a negro, is not such a mistake of fact as will excuse the vendor from performance of the contract or authorize a rescission, although the sale will depreciate the value of his property and he would not have made the same if he had known the fact; there having been no concealment or fraud.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 11, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.
Andrew R. Black, for respondent.

PARKER, J.—This is a suit to enforce specific performance of a contract for the purchase of real property. A trial resulted in a decree of specific performance in the plaintiff's favor, and the defendant has appealed therefrom.

The facts affecting the rights of the parties may be summarized as follows: The appellant is the owner of a large addition to the city of Seattle, which is generally regarded as high class residence property. The respondent is of the negro race. The appellant claims, and introduced evidence tending to show, that if sales of lots in this addition were made to people of that race it would depreciate the value of the addition as residence property, and result in material loss to appellant, and that for that reason appellant has refrained from selling to negroes. In 1907 appellant entered into a contract for the sale of one of the lots to respondent. The contract was executed by appellant by its president and secretary, and was executed by respondent

[1]Reported in 112 Pac. 368.

by A. R. Black, his agent and attorney. Appellant did not know that respondent was a negro until after all payments had been made upon the purchase price and he was entitled to a deed under the terms of the contract, a year or more after its execution. There is no evidence that respondent purposely concealed from appellant that he was a negro, nor that he knew that the fact of his being a negro would have induced the appellant to refrain from selling him the lot. The consummation of the sale in respondent's behalf by others was evidently because of the fact that his business rendered it more convenient to have the matter attended to in that way. We may also add that the evidence does not show that any of the persons dealing with appellant for respondent knew that the fact of his being a negro would have induced appellant to refrain from selling him the lot. Upon discovering that respondent was a negro, appellant offered to refund to him the purchase money with interest, and refused to give him a deed upon the sole ground that he was a negro and that appellant did not know that fact at the time the contract was made nor until after the purchase price was paid.

The substance of appellant's contention is that these facts show such a mistake on its part as will entitle it in equity to rescind this contract and avoid specific performance thereof. We cannot agree with this contention. It seems to us that this mistake is not of the essence of the contract. It may have to do with the motive of appellant in making sales of lots in the addition, but we are unable to see how, in principle, this mistake differs from a mistake in value of a thing which may be the subject of a sale. It is not claimed that there was any fraud in this transaction; of course there could not be, because both parties were ignorant of facts which would have induced appellant not to make the sale. Both parties were not ignorant of the same facts it is true, but appellant not knowing that respondent was a negro, and respondent not knowing that such fact would influence appellant not to make the sale, it is the same in effect as if they were both ignorant of some

single fact affecting appellant's motive; such, for instance, as both being ignorant of and mistaken as to the real market value of the lot. If there is any difference here as to the obligation resting upon the respective parties to inform themselves as to the facts which would induce appellant not to make the sale, it would seem more just to require appellant to inform itself as to the race of respondent than to require respondent to inform himself as to appellant's desire not to sell to negroes. Appellant certainly had more reason to pay attention to facts affecting its own motives than respondent had to suppose that such motives would be affected by the mere fact that he was a negro. It may well be argued that there was no mistake on the part of appellant as to the person of respondent. There was no mistake as to his ability to perform his contract, but only as to his color, which in no way affected the rights of either party as expressed by the terms of this written contract. While respondent's color would have induced appellant not to make the sale had it known that fact, that was not of the essence of the contract, but related to a supposed influence that such a contract would have upon other interests of appellant. It seems to us that this mistake does not come as near being related to the rights of the parties under the contract as a mistake in the value of the thing sold would, and it seems clear that a mistake of that nature, in the absence of fraud with the parties standing at arm's length, would not entitle either party to rescind. *Sankey's Executors' v. First Nat. Bank*, 78 Pa. St. 48; *Dambmann v. Schulting*, 75 N. Y. 55; *Stettheimer v. Killip*, 75 N. Y. 282; *Comer v. Granniss*, 75 Ga. 277.

We have not had any decisions of the courts called to our attention involving a mistake of this exact nature, but we think the cases above cited are applicable to the principle here involved. We are of the opinion that the decree of the learned trial court should be affirmed. It is so ordered.

RUDKIN, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 8901. Department One. December 29, 1910.]

C. B. MERRITT, *Respondent*, v. GEORGE J. HIBBARD *et al.*, *Appellants*.[1]

FRAUD — PLEADINGS — COMPLAINT — SUFFICIENCY. A complaint states a good cause of action for conspiracy to defraud, where it is alleged that the plaintiff was induced by the defendants, through false representations and a prior course of dealing, to put up $3,000 to pay for a worthless timber claim which one of the defendants had agreed to repurchase for a client at an advance.

SAME—ALLEGATIONS OF VALUE—DAMAGES. In such a case, an allegation that the claim was of no value is not essential to the recovery of damages, where the plaintiff was induced to put up the money and was not to take any title, the name of the grantee in the deed being left blank and to be filled in on the resale to defendant's client.

FRAUD—ACTIONABLE REPRESENTATIONS. Upon a conspiracy to defraud, whereby plaintiff was induced to put up the money to purchase a worthless timber claim, representations that defendant's client had agreed to purchase the claim and that a cruise had been made showing it to be valuable, are actionable.

FRAUD—EVIDENCE—ADMISSIBILITY. Upon a conspiracy to defraud, whereby plaintiff was induced to purchase a worthless timber claim, evidence of the small value of the claim is admissible.

NEW TRIAL—GROUNDS—ERROR OF LAW. A new trial is properly granted where the trial court had committed error of law in granting a nonsuit or in excluding evidence.

Appeal from an order of the superior court for King county, Ronald, J., entered January 18, 1910, granting plaintiff a new trial, after the granting of a nonsuit, in an action for fraud tried before the court and a jury. Affirmed.

McBurney & Cummings and *Reed & Hardman*, for appellants.

Heber McHugh and *John T. Casey*, for respondent.

PARKER, J.—By this action the plaintiff seeks to recover damages from the defendant, A. L. Grandy, George J. Hib-

[1]Reported in 112 Pac. 350.

bard, and John F. Reed, which it is alleged resulted to plaintiff from deceit and fraud practiced upon him by the defendants, inducing him to advance the sum of $3,000 for the purchase price of a certain timber claim. The defendant Reed demurred to the complaint. His demurrer being overruled, he answered, denying the acts of fraud and deceit charged against him. The defendant Hibbard answered separately, denying the acts charged against him. The defendant Grandy is not a party to this appeal, so we are not concerned with the disposition of his contentions by the trial court. The cause proceeded to trial with a jury, against all of the defendants, and at the conclusion of the evidence introduced in behalf of the plaintiff, the court granted a nonsuit in favor of all of the defendants. Thereafter the plaintiff moved for a new trial, which motion was granted. The defendants Hibbard and Reed have appealed from the order granting a new trial.

The first general contention made by counsel for appellants is that the trial court erred in overruling the demurrer to the complaint, and in admitting evidence over appellants' objection, made upon the ground that the complaint failed to state a cause of action. The complaint is of considerable length, and there may be some things in it which would render it objectionable and vulnerable to attack in some manner, but we are now only concerned with its sufficiency as against a general demurrer, since that is the form of attack made both by the demurrer and the objection. It alleges in substance the following: All of the defendants were engaged in buying and selling timber land in this state at and prior to the time of the commission of the acts complained of. At the same time, plaintiff and defendant Grandy were copartners engaged in selling timber lands in this state. All of the parties had their places of business at Seattle. In 1906, plaintiff met one M. L. Fitch, a timber buyer of Grand Rapids, Michigan. Plaintiff was then informed by Fitch that he

would buy any good timber lands in this state which plaintiff or his firm could procure for him. Plaintiff was also then informed by Fitch that he would have to return to and remain in Michigan, and would be represented in this state by defendant Hibbard, who was a stepson of Fitch. Plaintiff was also then informed by Fitch that he would buy timber lands on the cruise of one J. A. Withrow, a timber cruiser living in Clallam county, and thereafter Fitch did invariably buy timber lands on the unverified cruise of Withrow until August 9, 1907. During this period plaintiff and his firm procured many timber claims for Fitch by the following course of business, which was well known to defendants.

"After being advised that a tract of timber was for sale, said Hibbard would inform plaintiff that Fitch had written him, said Hibbard, to buy it at a certain price, and that the money to pay for the same would be sent to the State Bank of Seattle, or to the Port Angeles Bank, as soon as the claim was secured, and said Hibbard would tell plaintiff to buy said tract for said Fitch and have a nominal consideration of five or ten dollars inserted, and have the said deed run to blank grantee and then have the deeds so made out deposited in one of the banks as aforesaid, all of which plaintiff would do, and said deeds would remain in the bank until the money would arrive from said Fitch. That there was always more or less time elapsed between the order by Hibbard and the arrival of the money at the bank, but the same invariably came prior to said 9th day of August 1907, and upon its arrival the said money was paid over to the respective grantors on the order or instructions from plaintiff. That plaintiff had nothing to do with the examination of abstracts. That in the purchase of said tracts, arranging payments therefor, securing deeds and fixing prices, plaintiff acted solely on the statements of said Hibbard."

In cases where haste was necessary Hibbard communicated with Fitch by telegraph. Some time prior to August 9, 1907, the claim here involved was offered to defendant Grandy by an agent of defendant Reed for $800, and thereupon Grandy agreed to buy the claim at that price, and was sent by the

agent to Reed to close the deal. Grandy concealed from plaintiff all knowledge of this transaction, and secretly obtained knowledge from Reed that the land was worthless, and on August 9, 1907, Grandy knew that the land was without timber and worthless, and fraudulently concealed all such knowledge from plaintiff. Reed secured control of the claim from the owner for little or no consideration, and for a long time prior to August 9, 1907, he knew it was worthless. Hibbard having asked plaintiff to buy the claim from Reed, plaintiff advised with Grandy as a partner concerning it, when Grandy stated that he had no money himself, but advised plaintiff to use his own money, which Grandy knew plaintiff had, and to do as Hibbard directed and there would not be much delay in getting a return of the money, as Fitch would take the land. Hibbard, acting in concert with the other defendants, stated to plaintiff that the claim was for sale, and that Fitch had written to him that he would buy it and would pay as much as $4,000; that he, Hibbard, had received a letter from Fitch inclosing a cruise of the timber on the land by Withrow, showing 6,500,000 feet of timber on it; that Reed held the claim for sale and urged plaintiff to buy it for Fitch; and that if plaintiff would raise the money and get the claim for $3,000, Hibbard would allow $3,500, and if plaintiff had to pay $3,500 they would allow $4,000 for the claim, according to the instructions of the letter; that as soon as the price was fixed with Reed and the claim secured, Hibbard would wire Fitch and the money would be sent to the bank, not more than fifteen days off at the longest. Believing these statements to be made in good faith and relying on them, plaintiff went to Reed, and thereupon Reed falsely and designedly stated to plaintiff that the claim was already sold and that the price was $3,000; that the purchaser had not yet paid anything down, and that if plaintiff would pay for the claim first he could have it.

Thereupon plaintiff went at once and told Hibbard of the statements of Reed. Thereupon Hibbard pretended to wire to Fitch that the price was $3,500, and for him to send the money immediately to the bank. Hibbard again told plaintiff that he was anxious to get the claim, and urged plaintiff to raise the money.

Relying upon these statements, on August 12, 1907, plaintiff paid to Reed $3,000, and took a deed reciting a nominal consideration, with the name of the grantee left blank as instructed. Fitch had not written to Hibbard and had not sent a cruise of the timber by Withrow, and had not told Hibbard to pay any sum for the claim, nor did Hibbard wire Fitch as he pretended to do, and all of the statements so made by Hibbard were false and made by him to deceive and defraud plaintiff. The statements made by Reed to plaintiff to the effect that the claim was sold for $3,000 to a purchaser who had not paid anything down was false and made to mislead and deceive plaintiff. The statements made by Grandy to plaintiff were also false and known to be such by Grandy. All of the defendants knew at the time that the claim was without timber and valueless, and knew that plaintiff would rely on the statements of Hibbard; and plaintiff was induced thereby to part with his money, in the manner alleged. Plaintiff has at all times held the land for the benefit of the defendants. Plaintiff alleges that all of these false and fraudulent acts and representations were made by defendants for the common purpose of cheating and defrauding him. Plaintiff alleges in conclusion, "That by reason of the premises aforesaid plaintiff has been damaged in the sum of $3,000, besides costs and disbursements," and prays for judgment against all the defandants in that sum.

The learned trial court adopted the theory, upon the trial, that the complaint stated facts which would warrant a recovery upon the ground of conspiracy to defraud plaintiff. We think the complaint is good as against a general

demurrer, upon that theory. Some contention is made that the allegation of damage is not sufficient, since it is not specifically alleged that the claim is in fact worthless, but only that the defandants knew it was without value. Adopting the theory of the learned trial court, as we do, the question of value of the claim becomes of little or no consequence as a fact to be pleaded, because plaintiff is not claiming the land as his own. According to the complaint, it was never contemplated by him that the title should pass to him, but to Fitch, or whoever Fitch should designate as the grantee, the name of the grantee being left blank in the deed for that purpose. The value of the claim, as a matter of evidence, had some relevancy to the issues. If the claim in fact has but little or no value and defendants knew it, that fact would have a tendency to show that Hibbard never intended to have his stepfather, Fitch, actually purchase it, and would also tend to show that the other defendants would likely know of such intentions on the part of Hibbard; but that would not make plaintiff's measure of damages the difference between the actual value of the claim and the $3,000 advanced by him for its purchase.

Some contention is made that the principal representations relied upon by plaintiff and inducing him to act were promissory in their nature and related to future events, rather than to existing facts. We think such is not the case. The representations made by Reed all related to existing facts. The representations made by Hibbard to the effect that Fitch had written Hibbard that he would purchase the claim and pay as much as $4,000 for it, and that Fitch had a cruise of the timber which he had sent to Hibbard, made by Withrow, showing it to be a valuable claim, clearly were intended as representations of existing facts. These, together with Reed's representations as to the necessity of paying the entire purchase price of $3,000 promptly, in order to get the claim, were well calculated, in view of the relation of the

parties, as shown by the allegations of the complaint, to induce plaintiff to act as he did.

The next general contention is that the court erred in granting a new trial. This contention is based upon the alleged insufficiency of the complaint, which we have already noticed, and also upon the theory that the nonsuit was properly granted. The record does not disclose the theory of the learned trial court in granting a new trial. It may have been only because he concluded that he was in error in granting the nonsuit, or he may have concluded that he was in error in excluding certain evidence touching the actual value of the claim. Plaintiff attempted to prove that the claim was of no value. This proof was excluded by the court. We have seen that such proof was admissible; and while the record does not so show, it is probable that the trial court entertained this view upon disposing of the motion for new trial. We have read all of the evidence and are of the opinion that it was sufficient, especially with the offered proof of the small value of the claim, to require the submission of the cause to the jury upon the theory we have indicated. In any event we cannot say from this record that the granting of a new trial was an abuse of discretion. In order to reverse this order we would have to conclude that upon no possible theory could plaintiff recover. The condition of the pleadings and the manner of trial rendered the issues and the theory of plaintiff's case somewhat confusing. We conclude, however, that the granting of a new trial was not erroneous. The order is affirmed.

RUDKIN, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9036. Department One. December 29, 1910.]

CARL CAVELIN, *Appellant*, v. STONE & WEBSTER ENGINEERING CORPORATION *et al.*, *Respondents*.[1]

MASTER AND SERVANT—FELLOW SERVANTS—INCOMPETENCY—EVIDENCE—SUFFICIENCY. Incompetency in a common mason or bricklayer is not shown by evidence that he was nervous, and in a hurry about his work, and had on one or two occasions broken or pulled out the line marking the outer edge of the wall.

MASTER AND SERVANTS—FELLOW SERVANTS. Masons engaged in laying brick are fellow servants when stretching a line to mark the outer edge of the wall.

MASTER AND SERVANT—NEGLIGENCE—SAFE APPLIANCES. A corporation, engaged in the construction of a building, cannot be assumed to be negligent in furnishing an insufficient nail to hold the bricklayer's line, where there was no testimony that it had furnished any nail, and one of the witnesses testified that it was customary for the masons to select the nails.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 15, 1910, upon granting a nonsuit, dismissing an action for personal injuries sustained by a employee engaged in laying brick. Affirmed.

Heber McHugh and *John T. Casey (Milo A. Root*, of counsel), for appellant.

Farrell, Kane & Stratton and *Kerr & McCord*, for respondents.

RUDKIN, C. J.—On the 29th day of June, 1909, the plaintiff, the defendant Melburg, and a number of fellow workmen in the employ of the defendant Stone & Webster Engineering Corporation, were engaged in laying brick in the wall of the ninth story of the Henry building, in the city of Seattle. The wall in question was about forty feet in length, and ten or twelve masons in all were engaged in the work. A line was extended along the outer edge of the wall from

[1]Reported in 112 Pac. 349.

one end of the stretch to the other, to which the brick were laid. This line was fastened at one end by a small wire nail inserted in the mortar between the brick, and to a similar nail or spike at the opposite end. Every time a row or tier of brick was laid it became necessary to raise the line for the next tier, and the change was made by the two men at the end of the line. This duty was not assigned to any particular employees, but devolved upon whomsoever happened to be working at the end of the line when it became necessary to make the change. As soon as a tier of brick was completed, a warning or command was given by the man at the "tie-end" of the line, or by some of the other workmen, to raise the line, whereupon the man at the "stick-end" would remove the nail from the wall and reinsert it at the proper place, after which the line was drawn tight and fastened by the man at the opposite end.

Shortly after the noon hour on the above date, a command was given to raise the line, and the plaintiff undertook the performance of that duty. After he had inserted the nail between the brick, the line was drawn tight by the man at the opposite end, and the nail flew out, striking the plaintiff in the eye and causing the injury for which a recovery was sought in this action.

At the close of the plaintiff's testimony the court directed a nonsuit, from which this appeal is prosecuted. Many delinquencies on the part of the master were charged in the complaint, but we will consider such only as are relied on in support of the appeal. These are, first, that Otto Melburg, "the tie-end man," whose act caused the injury complained of, was reckless, incompetent, and habitually careless in the performance of his duty, and that such incompetency was known, or should have been known to the respondent corporation by the exercise of reasonable care and diligence on its part; second, that Melburg was a vice principal; and third, that the small nail furnished by the master was unsafe and insufficient for the purpose for which it was furnished and used. The only

evidence offered tending to show the incompetency of Melburg, or knowledge of such incompetency on the part of the master, was some slight testimony to the effect that "he appeared to be nervous," "in a hurry about his work," and had broken the line and pulled the nail on one or two previous occasions. Such testimony, in our opinion, is utterly insufficient to show incompetency in a common mason or bricklayer. He was not employed to operate or handle dangerous agencies or dangerous machinery, and had only been engaged in this particular work for an hour or two at best before the accident. The duty assigned him was such as falls to the lot of every workman. There was nothing unusual or dangerous about it, and no special skill or experience was requisite to its safe and proper performance. True, there was some testimony tending to show that it required some experience to qualify one to properly perform this simple task, but it is a matter of common knowledge, known to all men, that it requires no peculiar skill or knowledge to qualify one to safely stretch a small line forty feet in length, and so-called expert testimony to the contrary imposes too great a tax on the credulity of either court or jury.

Nor is there any merit in the claim that Melburg was a vice principal. The complaint proceeded upon the theory that he was a fellow servant, negligently employed or retained, and this theory is manifestly correct, so far as his mere relations to the appellant were concerned. *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405; *Desjardins v. St. Paul & Tacoma Lumber Co.*, 34 Wash. 283, 102 Pac. 1034. If two men thus employed are not fellow servants that doctrine is indeed abrogated in this state. If the act of stretching a line for bricklayers is the act of the master and cannot be delegated, the cost of superintending the construction of a building would exceed the cost of construction itself.

If we concede that the nail in use was insufficient for the purpose, there is no testimony in the record tending to show that it was actually furnished by the master. There was

testimony tending to show that it is customary for the master to furnish such appliances, but none that the master did in fact furnish it. One of the witnesses for the appellant testified that it is customary for the men to get their own nails, and to select such as they may choose about the works. In the absence of testimony tending to show whether the nail was furnished by the master or selected by some fellow servant, we cannot indulge in presumptions or assume that the respondent corporation was negligent. Some questions of concurring negligence are discussed in the briefs, but if there was no negligence on the part of the respondent corporation there could be no concurring negligence. There was perhaps sufficient testimony tending to show negligence on the part of Melburg to go to the jury, but there is no assignment of error on that point, and no discussion of that question in the briefs.

The judgment of the court below is therefore affirmed.

MOUNT, GOSE, PARKER, and FULLERTON, JJ., concur.

[No. 8970. Department Two. December 30, 1910.]

C. F. PETERSON, *Respondent*, v. ST. FRANCIS HOTEL COMPANY, *Appellant*.[1]

BROKERS—COMMISSIONS—SALE BY OWNER—REASONABLE VALUE OF SERVICES. An owner is liable for the reasonable value of a broker's services, where, after listing the property at a certain price, he made a sale at a less price, sought the broker's aid in effecting the sale, and recognized his services by endeavoring to reach a new agreement with him as to the commissions to be paid.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 8, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover a broker's commissions. Affirmed.

[1]Reported in 112 Pac. 347.

G. E. Steiner, for appellant.

Howard H. Startzman and *Frank Hammond*, for respondent.

MORRIS, J.—On June 7, 1907, appellant listed its hotel, the St. Francis, with respondent for sale. The contract of listing was the usual broker's contract. It fixed the terms at $65,000, of which $43,000 was to be paid in cash, and the balance by assuming an indebtedness on the furniture of $22,000. The time of the contract was twenty-seven days and thereafter until withdrawn by ten days' written notice. The commission was fixed at $3,000.

In October following, a Mrs. Johnson called at the hotel and was shown through it by Mr. Kennedy, its manager, and a price of $60,000 given her. When she left, Mr. Kennedy called the respondent by telephone, gave him Mrs. Johnson's address, and asked him to call upon her and endeavor to bring about a sale. Respondent did so, and endeavored to effect a sale of the hotel. In doing so he discouraged her from negotiating for the sale of another hotel she had been negotiating for, and after some conversation relative to the hotel and its furniture, suggested she call upon Mr. Rankin, who held a conditional sale agreement covering the furniture, and made an appointment with her at his office for the following day. Mrs. Johnson called on Mr. Rankin, learned the situation as to the furniture, and without again negotiating with respondent, called on Mr. Kennedy and thereupon entered into negotiations with him for the purchase. Respondent notified Mr. Kennedy of the result of his call upon Mrs. Johnson, and also informed him of her failure to keep her appointment on the following day. Mrs. Johnson, during her negotiations with Mr. Kennedy, spent several days watching the operation of the hotel, examining its books, inspecting the premises, and informing herself generally as to the existing situation, and finally purchased the same for $55,000. Three thousand dollars was paid in cash, the indebtedness for the furniture assumed, and the balance secured by promissory

notes; the change in the price being made without the knowledge of the respondent. In the meantime Mr. Kennedy had called respondent to the hotel, told him Mrs. Johnson had made an offer of $55,000, and said on that basis he would not be willing to pay $3,000 commission, and some conversation was had relative to an understanding of what the commission would be if the sale went through, but nothing definite was determined. Mr. Kennedy also called at respondent's office, and they had several conversations over the telephone in regard to the same matter. Being unable to bring about an adjustment of the matter, respondent finally brought suit, and was awarded judgment in the sum of $1,625, and defendant appeals.

The court arrived at the amount of the judgment by following the established custom of brokers at Seattle, computing five per cent on the first $10,000, and two and one-half per cent on the balance. The errors suggested are in the findings of fact. We are not disposed to disturb the court's findings upon controverted questions of fact, unless the record presents manifest error. We find none such here, and a reading of the testimony convinces us the judgment is right. Appellant unquestionably sought the aid of respondent in making the sale to Mrs. Johnson. It recognized a value in respondent's services in endeavoring to reach an agreement with him as to what it should pay. In undertaking to sell at a less price than the one given to respondent, and at other terms, it could not deprive respondent of the benefit of his contract. He was still entitled to his commission, to be determined by the terms of sale agreed upon between appellant and its vendee. *Lawson v. Black Diamond Coal Co.*, 53 Wash. 614, 102 Pac. 759. In this case the recovery sought was the reasonable value of the services. The respondent could, to that extent, waive his contract and recover the reasonable value of his services which, according to the testimony, is the amount fixed in the judgment, and the same is affirmed.

RUDKIN, C. J., CHADWICK, DUNBAR, and CROW, JJ., concur.

[No. 9080. Department Two. December 30, 1910.]

JOHN JAGGY *et al.*, *Respondents*, v. PATRICK ROONEY *et al.*, *Appellants*.[1]

APPEAL—REVIEW—FINDINGS. Findings upon very conflicting evidence will not be disturbed on appeal.

BOUNDARIES — COMMISSIONERS TO ESTABLISH — DISCRETION — REVIEW. Under Rem. & Bal. Code, § 948, providing for the appointment of commissioners, not exceeding three, to establish disputed boundaries and make an advisory report to the court, the appointment of commissioners is discretionary, and not subject to review on appeal.

SAME—NUMBER OF COMMISSIONERS. Under Rem. & Bal. Code, § 948, a single commissioner may be appointed to establish a disputed boundary.

APPEAL—REVIEW—HARMLESS ERROR—ADVISORY REPORT. Error cannot be predicated upon the failure of a commissioner to take the oath, where his report is only advisory and the court heard other evidence.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered November 12, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to establish a lost boundary. Affirmed.

Jas. P. Stapleton, for appellants.

H. W. Arnold and *A. L. Miller*, for respondents.

MORRIS, J.—Action to establish a lost boundary; findings and decree for plaintiffs, and defandants appeal.

The defense was a denial of all the allegations of the complaint, save ownership of the lands in controversy, and an affirmative defense pleading the establishment of a true boundary fence for a period of thirty years. The evidence was very conflicting, and so far as the findings represent the facts submitted to the court and his determination thereof, we are not disposed to disturb them under the long-established rule

[1]Reported in 112 Pac. 367.

of this court. Some legal questions are presented in the errors suggested, which we will pass upon.

The court appointed three commissioners to establish the boundary in question. They were unable to agree, and were discharged. The court thereupon appointed one commissioner who was one of the three previously appointed. It appears from the record that this commissioner failed to take the required oath. He nevertheless proceeded with his duties, made his report, and the same was accepted by the court. Appellants contend that the statute does not contemplate the appointment of one commissioner, and any report made by such single commissioner is valueless. Further, this commissioner, not having been sworn as directed by the statute, was not in fact a commissioner, and his report is valueless for such reason.

The statute, Rem. & Bal. Code, § 948, provides that the court may in its discretion appoint commissioners not exceeding three, who shall, before entering upon the discharge of their duties, take an oath to faithfully discharge the same. They shall make a report to the court, which said report shall be advisory. Under the statute the appointment of commissioners is purely a discretionary matter with the court, and any report made and filed by such commissioners is of no value, except as advisory to the court, should he deem it best to accept it as such. *Stangair v. Roads*, 41 Wash. 583, 84 Pac. 405. And since such appointment is discretionary with the court, he may appoint one or more commissioners as in his discretion, from the facts before him, seems best. *Struntz v. Hood*, 44 Wash. 99, 87 Pac. 45. No error can therefore be predicated on the court's failure or refusal to appoint more than one commissioner; and since the report of such commissioner is of no final probative value, but only advisory, a mere irregularity, such as the failure to be sworn before entering upon the discharge of his duties, cannot be regarded as reversible error here. Such report being merely advisory, the court may reject it as a whole, or receive it in part. He may

accept it in so far as it agrees with his conclusions upon other facts presented to him, or refuse to give it any weight. The court's action upon discretionary and advisory matters is not subject to review in this court, since we have no way of determining the effect of such matters upon the mind of the court, or to what extent, if any, his judgment has been influenced or based upon such matters. Much evidence was before the court upon all the disputed issues.

Many witnesses testified as to the fence claimed as the true boundary and as to witness trees, earth mounds, and other indicia of the original government survey, slashings, clearings, cultivation of crops, and other improvements upon and in the disputed line were by the testimony called to the court's attention; from all of which the court reached his conclusion. To what extent if any he made use of the report of the commissioner in its advisory nature, we have no means of ascertaining. He may have given great credence to it; he may have rejected it altogether.

Finding no error, the judgment is affirmed.

RUDKIN, C. J., CHADWICK, DUNBAR, and CROW, JJ., concur.

[No. 8997. Department Two. December 30, 1910.]

W. P. WHITE, *Respondent*, v. L. L. RATLIFF *et al.*, *Appellants*.[1]

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Written exceptions to instructions filed with the clerk and not in any way considered by the court are insufficient.

APPEAL—REVIEW—VERDICT. A verdict sustained by conflicting evidence will not be set aside on appeal.

HUSBAND AND WIFE—ACTIONS—JUDGMENT AGAINST COMMUNITY—LIABILITY OF WIFE. A judgment against L. R. and the community composed of L. R. and E. R., husband and wife, merely establishes the community character of the debt, and is not a personal judgment against the wife.

[1]Reported in 112 Pac. 502.

APPEAL—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR. One alleged to be the wife of a defendant is not prejudiced by a judgment establishing the community character of his debt without any proof of the marriage relation, where no personal judgment was taken against her.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 24, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Robertson & Miller and *E. E. Brennan*, for appellants.

Henry Jackson Darby, for respondent.

PER CURIAM.—Respondent, who was plaintiff below, brought this action to recover for services performed under an oral contract. His term of service ran over a period of five months, and, as he alleges and the jury found, he was to receive the sum of $300 per month. Appellants denied the employment of respondent, and alleged affirmatively that, if the respondent performed any service, it was for the New Crystal Mining Company of which appellant L. L. Ratliff was manager. The jury returned a verdict in favor of the respondent.

Error is assigned as follows: In instructions given and refused; insufficiency of the evidence to sustain the verdict; and in rendering judgment against appellant Etta Ratliff. The record shows the verdict to have been rendered on the 21st day of January, 1910. A motion for a new trial was filed on January 22, and overruled on February 19 following. A formal judgment was signed by the court, and filed on February 24. On January 22, written exceptions to some of the instructions given by the court were filed with the clerk, and are brought here as a part of the transcript. It does not appear that they were served on the attorney for respondent, or in any way considered by the court. Under the rule announced in *Coffey v. Seattle Elec. Co.*, 59 Wash. 686, 109 Pac. 202, and followed in *Gerber v. Aetna Indemnity*

Co., *ante* p. 184, 112 Pac. 272, the exceptions to the instructions given are not properly before us. Nor does the record show a refusal to give any requested instructions. Passing this assignment, it only remains to say that the testimony was conflicting, and while the veracity of the verdict may well be questioned, there is some evidence to sustain it. In such cases the judgment will not be disturbed on appeal.

Objection is also made to the form of the judgment, in that it is against appellant L. L. Ratliff and Etta Ratliff, his wife. It is alleged in the complaint that appellants are husband and wife. This is denied. No testimony was offered to sustain the complaint in this regard. No personal judgment was taken against Etta Ratliff. The judgment recites, "that said plaintiff do have and recover of and from the said defendant L. L. Ratliff and of the community composed of L. L. Ratliff and Etta Ratliff, husband and wife, the sum of $1,500," etc. We think the judgment goes no further, and could go no further, if appellants be in fact husband and wife, than to establish the community character of the debt (*Anderson v. Burgoyne*, 60 Wash. 511, 111 Pac. 777), and it would follow that, if Etta Ratliff is not the wife of L. L. Ratliff, she is in no wise injured by the form of the judgment.

Judgment affirmed.

[No. 8728. Department Two. December 30, 1910.]

William H. Wilton, *Respondent*, v. Pierce County *et al.*, *Appellants*.[1]

Municipal Corporations—Annexation of Territory—Elections—Validity—Polling Places. Under the general election laws which require the division of a county into election precincts and the designation of one voting place in each precinct, and which make residence within the precinct a necessary qualification of an elector, a city election for the annexation of territory is void where no voting places were designated in several of the precincts; since the electors therein were thereby disfranchised.

Injunction—Jurisdiction—Elections—Municipal Corporations—Political Questions. An injunction against the canvassing of returns of an illegal city election for the annexation of territory involves property rights, and a court of equity will not refuse jurisdiction on the ground that only a political question is involved.

Municipal Corporations—Annexation of Territory—Injunction—Persons Entitled to Sue. Rem. & Bal. Code, § 4945, providing that no person can contest an election unless he is a qualified elector of the district etc., in which the office is to be exercised, has no application to an action in equity to enjoin the canvass of returns of an illegal city election for the annexation of territory.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 16, 1910, upon the pleadings, after overruling a demurrer to the complaint, enjoining the canvassing of election returns. Affirmed.

J. L. McMurray and *Frank D. Oakley*, for appellants.

F. Campbell and *Burdick & McQuesten*, for respondent.

Morris, J.—Appeal from a decree granting an injunction, enjoining appellants from canvassing the returns of an election held January 8, 1910, the purpose of which was the annexation of territory to the city of Tacoma. The complaint alleged respondent to be a resident and freeholder within the territory sought to be annexed, and then followed

[1]Reported in 112 Pac. 386.

a number of alleged illegal features in the holding of the election, only a few of which we will notice, as the decree was entered upon motion for judgment upon the pleadings. We will, therefore, only refer to those charges which are admitted in the answer and upon which the judgment must rest, if at all.

The complaint charged, and the answer admitted, the places fixed in the notice where the election would be held, which places in some instances were not within the regularly established voting precinct of the county within the district sought to be annexed. It is also admitted that, in eight of the precincts of the county, portions of the territory of which were included within the district sought to be annexed, no polling places were established by the notice calling for the election. The election was held under Laws 1907, ch. 245, p. 676 (Rem. & Bal. Code, § 7445 *et seq.*), providing that, upon the presentation of a petition signed by twenty per centum of the qualified electors resident within the territory sought to be annexed, the board of county commissioners, after due hearing and determination of regularity, shall call "an election to be held in such proposed territory to be annexed," notice of which shall be given in form not material to be here inquired into. "Such election shall be conducted in accordance with the general election laws of the state, and no person shall be entitled to vote thereat unless he shall be a qualified elector." The general election laws, under which an election of this character is, by the terms of the act, to be held, provide that the board of county commissioners in each county shall divide their respective counties into election precincts, establish the boundaries thereof, and designate one voting place in each precinct. Rem. & Bal. Code, § 4798. This annexation act also provides that the question of annexation of the proposed territory shall be submitted to the qualified electors of the territory. Among the necessary qualifications of an elector is residence within the precinct for thirty days preceding an election. Manifestly, then, a

resident of the proposed territory would not be a qualified elector therein, except as he was a qualified elector of some already established precinct. Residence within the precinct being a necessary qualification, one could not be a qualified elector except within the precinct in which he resided; and any attempt to exercise the right of franchise under the general law must be made within the precinct in which the elector resides. Outside of the boundaries of that precinct he is not a qualified elector for the purpose of there voting. When, therefore, an elector in "White" precinct was compelled to go to a designated place in "Black" precinct to cast his vote, he lost his right thereto. When he left the boundaries of "White" precinct in which he resided and attempted to cast a vote in "Black" precinct, such a vote was not the vote of a qualified elector, and any election affected by such votes would not be an election by qualified electors. The question of convenience of the voters is not to be considered. It is rather one of qualification, and each elector must cast his vote within that precinct residence in which clothes him with the qualifications of an elector. The residents of these eight precincts who were compelled to go outside of their resident precincts in order to vote, lost the right to vote by doing so, and the question was not, as provided for in the act, submitted to the qualified electors of the territory.

Counsel for appellants argues such is not a correct construction of the statute, because in school elections voters may vote in places outside of the election precincts in which they reside. True; but in school elections, residence within election precincts is not a qualification of the voter. The qualification is special; not at all according to the general election laws as provided for in this statute, the qualification as to residence being residence within the school district. Manifestly, upon the same reasoning one could not vote at a school election in a district within which he did not reside. There is nothing contrary to these views in *Mayor of Val-*

verde v. Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. 208, and *State ex rel. Birchmore v. State Board of Canvassers*, 78 S. C. 461, 59 S. E. 145, 14 L. R. A. (N. S.) 850, cited by appellants. It follows that the election was not legal in that it was not an election by qualified electors.

Appellants contend that the court below had no jurisdiction; that the question is purely a political one. We concede that a court of equity has no jurisdiction over a purely political question, such as is involved in many questions growing out of some matters pertaining to or involving elections. But the question here submitted involves more than a political right; it reaches farther and touches the property right of the citizen. Such, we think, is established by previous holdings of this court upon a like question. *State ex rel. West Seattle v. Superior Court*, 36 Wash. 566, 79 Pac. 29; *State v. Nicoll*, 40 Wash. 517, 82 Pac. 895; *Brown's Estate v. West Seattle*, 43 Wash. 26, 85 Pac. 854. The freeholder in the rural and the freeholder in the urban district hold their property subject to different rights of taxation, special assessments, and different regulations as to sanitary and other regulations affecting the public health, safety and general welfare. It is too clear for argument that property in a city is subject to many restrictions which create a burden not borne by property outside of the municipal boundaries. When, therefore, the property of a citizen is brought within the municipal boundaries of a city, his property rights have been affected. He must now hold that property subject to many regulations, restrictions, and burdens not previously attaching to it. And in seeking to prevent such a transfer he presents more than a political question; it is one which affects him in his property as well as his political right.

Appellants further contend that respondent, in describing himself as "a resident and freeholder within the territory," pleads himself out of court, in that he fails to describe himself as an elector, and the general election laws provide that

"No person shall be competent to contest an election unless he is a qualified elector of the district, county, or precinct, as the case may be, in which the office is to be exercised." Rem. & Bal. Code, § 4945. This is not an election contest. Respondent is not here contesting the right of any person to hold office. Rather, he is seeking to protect an infringement of his property rights, attempted to be made without compliance with the law giving the right of such infringement.

Believing, therefore, that the failure to follow the mandate of the law as to the manner of holding this election rendered the same illegal, the respondent was entitled to the decree appealed from, and the same is affirmed.

RUDKIN, C. J., CROW, and DUNBAR, JJ., concur.

CHADWICK, J., took no part.

[No. 9110. Department Two. December 30, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. C. W. HAMSHAW, *Appellant*.[1]

CRIMINAL LAW—APPEAL FROM JUSTICE COURT—AMENDMENT OF COMPLAINT. Upon appeal from justice court in a criminal case, the superior court cannot allow an amended complaint to be filed, over objection by the accused.

Appeal from a judgment of the superior court for Snohomish county, Canfield, J., entered February 19, 1910, upon a trial and conviction of practicing dentistry without a license. Reversed.

John R. Parker and *Edwin J. Brown*, for appellant.

Ralph C. Bell, for respondent.

[1]Reported in 112 Pac. 379.

CHADWICK, J.—Defendant was brought to trial before a justice of the peace, upon the following complaint:

"George W. Wentworth, being first duly sworn, according to law, says: That at Marysville, in the county of Snohomish, state of Washington, on or about the 15th day of November, 1909, C. W. Hamshaw did practice dentistry without having obtained and filed a license as required by law in the county of Snohomish, state of Washington; the said county at all times mentioned being the place of residence of the said C. W. Hamshaw."

After moving to the jurisdiction of the court and the sufficiency of the complaint, he entered a plea of not guilty, and after a trial and conviction, appealed to the superior court. On January 22, 1910, an order was made by the superior judge, allowing the state to file an amended complaint, and that "the amended complaint should stand for and in place of the original complaint on file herein." The prosecuting attorney filed what purported to be an amended complaint, signed by the same complainant and sworn to before the justice, charging a violation of the dental law; in other words, stating a cause of action. The amended complaint was never filed in the justice court, but was entitled: "In the Justice Court before Noah Shakespeare, Justice of the Peace in and for Everett Precinct, County of Snohomish, State of Washington." The amended complaint was filed as a substitute; or, to use the words of the trial judge, "to stand for and in place of the original complaint." The case came on for trial February 10, 1910, resulting in the conviction of the defendant. A motion for a new trial, setting up the several grounds of the statute, was interposed, and being overruled, the defendant was sentenced to pay a fine of $50 and the costs of the prosecution. From this judgment, defendant has appealed.

We think appellant's objection to the right of the court to proceed in the way it did should have been sustained. There is no provision of the law for amending a criminal complaint. In *State v. Van Cleve*, 5 Wash. 642, 32 Pac.

461, it was held that a criminal pleading could not be amended as to substance.

"The vice of this sort of an amendment is made clear when reference is made to the statute which requires informations to be sworn to, that the defendant shall be arraigned, and that a certain time shall be allowed him to plead. Code Proc., §§ 1231, 1269 and 1271. This information was verified February 27, 1892. At the time it was amended no re-verification was made; no arraignment was had, and no plea was entered."

Our attention has been called to the case of *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132. In that case, however, the case just referred to, as well as the general rule, was not discussed by counsel in the briefs, or by the court in its opinion. In so far as it holds that the superior court has jurisdiction to "allow the complaint to be amended by the filing of a new complaint," it may be considered as overruled. The appeal in such cases is taken, and the case proceeds, *de novo* upon the transcript from the justice court. The statute does not allow, as in civil cases, any amendment to the pleadings. It can be no embarrassment to the superior court or in any way interrupt its procedure, if it is of opinion that the complaint does not charge a crime, or that the defendant should be held for trial, to enter an order of dismissal or order an information filed and, after arraignment and plea, proceed to the trial in an orderly way, thus acquiring jurisdiction in the manner sanctioned by the constitution and the statutes. No man should be held to answer in any court upon a complaint that does not charge a crime, or in a court that has not acquired jurisdiction in a lawful way. The right to arraignment and plea upon a sufficient charge, while perhaps not within the letter of the constitution, is within its spirit, and although the conduct of a defendant may be such that a court will hold the right to be waived (*State v. Quinn*, 56 Wash. 295, 105 Pac. 818; *State v. Straub*, 16 Wash. 111, 47 Pac. 227), it has never

been held that the formality could be dispensed with over the protest of the party charged.

The judgment of the lower court is reversed, and the cause remanded with instructions to dismiss the case.

RUDKIN, C. J., CROW, MORRIS, and DUNBAR, JJ., concur.

[No. 9034. Department Two. December 31, 1910.]

ELMER P. ANDERS, *Respondent*, v. JOSEPH BOUSKA, *Appellant*.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY—ATTACHMENT—LIEN—BONA FIDE PURCHASER FROM WIFE. Where community real property, record title to which was in the wife, is attached in a suit for a community debt, brought against the husband alone, the attachment is not notice to a subsequent *bona fide* purchaser from the wife, and such purchaser is not bound to take notice of the attachment lien indexed in the name of the husband and not shown in an abstract of title (RUDKIN, C. J., dissenting).

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 21, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Ernest E. Sargeant, for appellant.

N. D. Walling and *John C. Kleber*, for respondent.

CROW, J.—Action by Elmer P. Anders, against Joseph Bouska, to quiet title to real estate in the city of Spokane. From a decree in his favor, the defendant has appealed.

The evidence shows that Logan Snell and Clara Snell were husband and wife; that on October 31, 1906, Clara Snell acquired record title to the real estate, the presumption being that it became community property; that on November 19, 1906, Joseph Bouska commenced a personal action

[1]Reported in 112 Pac. 523.

in the superior court of Spokane county against Logan Snell alone, to recover judgment on an account for necessaries sold to him; that on the same date he caused a writ of attachment to be issued and levied upon the real estate here involved; that on February 1, 1907, after procuring an abstract of title which did not disclose the attachment lien, Elmer P. Anders, the respondent herein, purchased the real estate from Clara Snell for a valuable consideration, taking title thereto under and by virtue of a deed executed by her and Logan Snell, her husband; that respondent then had no notice of the attachment, or the pending action commenced by Bouska; that thereafter judgment was entered in favor of Bouska against Logan Snell, in pursuance of which an order of sale was issued to the sheriff of Spokane county, directing him to sell the attached property, and that it was sold on August 1, 1908, by the sheriff to Bouska; who now claims title. The action commenced by Bouska was against Logan Snell alone. The attachment was against his interest in the real estate. Clara Snell was not a party to the action or attachment, although appellant must have known she then held the record title. Before any judgment was obtained by Bouska, the property had been sold and conveyed to Anders, for a valuable consideration, without notice to him of the pending action or attachment.

In *Clerf v. Montgomery*, 15 Wash. 483, 46 Pac. 1028, 48 Pac. 733, the record title stood in the name of S. F. Montgomery, wife of J. M. Montgomery, the judgment debtor and only defendant in an attachment proceeding. Before judgment was obtained against her husband, the wife sold to one Christianson, a *bona fide* purchaser. We there said:

"Without specially reviewing the other assignments, we are satisfied that no error was committed by the court excepting in its finding that Christianson took the lands subject to the lien of the attachment. Christianson, we think, was a *bona fide* purchaser without notice of any incumbrance. The record title was in S. F. Montgomery, and the fact that

the copy of the attachment writ, together with a description of the property attached, was filed in the county auditor's office where such writ of attachment ran against the property of J. M. Montgomery, the order being to attach the interest of J. M. Montgomery only, could in nowise, it seems to us, be notice to a purchaser of the attachment of property the record title of which was in the name of another, even though that other should be the wife of J. M. Montgomery."

See, also, *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345.

The abstract of title procured by respondent did not disclose any attachment lien which, under Rem. & Bal. Code, § 8787, was undoubtedly indexed in the name of Logan Snell only. Respondent purchased from Clara Snell, holder of the record title. Had the appellant, Bouska, knowing she held the record title, made her a party defendant to the action which he commenced on a community obligation, and also to his writ of attachment, the lien which he obtained would have been indexed in her name also, thus giving constructive notice to any person who might thereafter deal with her as holder of the record title. This appellant failed to do, and under the case above cited, we think the respondent, shown to be a purchaser for value without notice of the lien, should be protected.

The judgment is affirmed.

DUNBAR, CHADWICK, and MORRIS, JJ., concur.

RUDKIN, C. J. (dissenting)—I dissent. Under section 5917, Rem. & Bal. Code, property "acquired after marriage by either husband or wife, or both," except such as is acquired by gift, bequest, devise or descent, with the rents, issues and profits thereof, is community property. Under the succeeding section, community real estate is subject to the lien of judgments recovered for community debts, and to sale on executions issued thereon. The land in controversy was the community property of Logan Snell and Clara Snell, his wife, on the 19th day of November, 1906, when levied upon under a writ of attachment, sued out in an action

prosecuted against the husband for a community debt. That the levy of the writ created a lien on the community property, I presume will not be denied, and that a deed from the wife alone would convey no title to a purchaser will not be gainsaid. The majority seem to proceed on the theory that, inasmuch as the record or paper title stood in the name of the wife, a purchaser from the community was not chargeable with notice of liens for community debts recorded against the husband alone. By a parity of reasoning it might be argued that neither was he chargeable with notice of any interest or claim the husband might have in or to the property. Yet all will concede that the purchaser was bound to take notice of the marriage relation of the parties, and of the community character of the property, and that a deed from the wife alone would be mere waste paper. And if the purchaser was chargeable with notice of the community interest of the husband in the property, why was he not likewise chargeable with notice of recorded liens against that interest. In *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172, this court held that "A deed of lands under the conditions specified in the statute vested the ownership in the community, no matter which spouse was named as grantee in the deed, and the title of one spouse therein was a legal title as well as that of the other." It is now held that that legal title vested in the husband may be acquired free from attachment liens for community debts recorded against it. In such a conclusion I cannot concur. I do not think that the majority opinion is supported by the two cases cited from this court, but if so, they are so entirely out of harmony with our community property system that they should be overruled.

[No. 9130. Department One. January 3, 1911.]

SAMUEL GARRETT, *Respondent*, v. SPARKS BROTHERS, *Appellant*.[1]

PRINCIPAL AND AGENT—THIRD PERSONS—LIABILITY OF AGENT—FRAUD. An agent in the sale of land is liable in damages for fraud whereby he induced the plaintiff to pay him money on the purchase price of the land.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 18, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover money paid under a contract to purchase land. Affirmed.

John M. Gleeson and *Joseph F. Morton*, for appellant.

Barker & Barker and *C. C. Upton*, for respondent.

GOSE, J.—This is a suit to recover money alleged to have been obtained from the plaintiff through the fraud of the defendant. There was a verdict and judgment for the plaintiff. The defendant has appealed.

There is abundant evidence to support the judgment. The testimony of the respondent shows that the appellant was acting as agent for the Plantations Company for the sale of certain tracts of orchard land; that the appellant represented to the respondent that the Plantations Company owned a piece of land called Plantations, divided into small tracts, free and clear of all incumbrances; that the respondent, believing and relying upon the representations, paid the appellant $1,000 on the purchase price of one of the tracts; that the representations were false, and that the Plantations Company, as the appellant well knew, did not own the land, but that it had only a contract of purchase which it later forfeited.

[1]Reported in 112 Pac. 501.

The appellant argues that the only issue is "the responsibility of an agent to answer to a third person for the default of a disclosed principal." On the contrary, the issue is the liability of the appellant to answer for its own fraud. The appellant cites, in support of its contention, *Wilson v. Wold*, 21 Wash. 398, 58 Pac. 223, 75 Am. St. 846; *Nelson v. Title Trust Co.*, 52 Wash. 258, 100 Pac. 730, and *Davis v. Lee*, 52 Wash. 330, 100 Pac. 752, 132 Am. St. 978. They have no application to the present issue. It is fundamental that a party, whether acting for himself or another, is liable in damages for his own fraud. The fact that the principal is also liable does not relieve from responsibility the party who actually commits the wrong. In such cases, the liability of the principal can only rest upon the delict of its agent. The party who has been wronged may elect to sue either or both.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 8942. Department One. January 3, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. ALEX McDOWELL, *Appellant*.[1]

JURY—RIGHT TO JURY TRIAL—FEDERAL CONSTITUTION—APPLICATION. The Federal constitutional guaranty of a trial by an impartial jury has no application to prosecutions in a state court for the violation of state laws.

SAME—RIGHT INVIOLATE—QUALIFICATION OF JURORS. Const., art. 1, § 21, providing that the right to trial by jury "shall remain inviolate," is not violated by Rem. & Bal. Code, § 94, requiring jurors to be taxpayers; since the constitutional guaranty and all the essential incidents of trial by jury are preserved.

CRIMINAL LAW—EVIDENCE—SIMILAR CRIMES—RES GESTAE. In a prosecution for assault with intent to commit sodomy, evidence of the same act upon another boy immediately after the first, is admissible as part of the *res gestae*.

[1]Reported in 112 Pac. 521.

TRIAL—MISCONDUCT OF JUDGE—COMMENT ON EVIDENCE. Remarks of the trial judge as to the youth of a boy thirteen years of age, made to counsel as reasons for overruling objections to leading questions, are not objectionable as comment on the evidence.

APPEAL—REVIEW—HARMLESS ERROR. Comment on the evidence that is not prejudicial is not ground for reversal.

CRIMINAL LAW—APPEAL—PARTY ENTITLED TO ALLEGE ERROR. Upon appeal by accused from a conviction, the state cannot urge error in that his sentence was under the wrong statute, and too light.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered October 5, 1909, upon a trial and conviction of assault with intent to commit sodomy. Affirmed.

William M. Thompson and *Keith W. Dunlop*, for appellant.

E. K. Brown and *Austin Mires*, for respondent.

GOSE, J.—The defendant was convicted of the crime of assault with intent to commit sodomy, and has appealed from the judgment entered upon the verdict. The first question raised is that the requirement that a juror shall be a taxpayer (Laws 1909, page 131; Rem. & Bal. Code, § 94), conflicts with the sixth article of amendment to the Federal constitution, which guarantees that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. This amendment has no reference to prosecutions in state courts for the violation of a state law. 8 Cyc. 1091; Cooley, Const. Lim., p. 46; *Twitchell v. Commonwealth*, 7 Wall. 321; *Edwards v. Elliott*, 21 Wall. 532; *Pearson v. Yewdall*, 95 U. S. 294; *Maxwell v. Dow*, 176 U. S. 581. In the *Maxwell* case the accused was tried for a felony in the state of Utah, in the state court, before a jury composed of eight jurors, and convicted and sentenced to imprisonment. The constitution of Utah provides "that in courts of general jurisdiction, except in capital cases, a jury shall consist of eight persons." It was contended, among other things, that the clause quoted violated the sixth amendment of the Federal constitution. The court

said that the contention had merit if the amendment was applicable to criminal prosecutions of citizens of the United States in state courts; that the amendment was not applicable, and that "the states so far as the amendment is concerned, are left to regulate trials in their own courts in their own way." *Thompson v. Utah*, 170 U. S. 343, and *Rasmussen v. United States*, 197 U. S. 516, cited by the appellant, hold that the amendment is operative in criminal prosecutions in the territories, and that the term "jury" means a jury of twelve persons.

It is also contended that the requirement that a juror shall be a taxpayer is violative of § 21 of art 1 of the state constitution, which provides that "the right of trial by jury shall remain inviolate." A juror was not required to be a taxpayer under the laws of the territory when the constitution was adopted. The precise point raised is that the legislature is powerless to prescribe any qualification for jury service in addition to that required at the time of the adoption of the constitution. This contention, we think, is without merit. While we think the point was ruled adversely to appellant's contention in *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355, we will proceed to a consideration of the question as if it were not controlled by that case. In *Redford v. Spokane St. R. Co.*, 15 Wash. 419, 46 Pac. 650, in considering another statute fixing the qualifications for jury service, this court said: "That the act requires that jurors shall be householders—a qualification not required by the old law—furnishes no sufficient reason in our judgment for holding that it is unconstitutional." The guaranty, says Johnstone, C. J., in *Wheeler v. Caldwell*, 68 Kan. 776, 75 Pac. 1031, means "that the right of trial by jury shall be and remain as ample and complete as it was at the time when the constitution was adopted." In *Vaughn v. Scade*, 30 Mo. 600, it was held that the guaranty means a jury of twelve men, but that "the non-essentials of that institution such as concern the qualifications of jurors, the mode of summoning them,

and many other such matters," are left to the wisdom of the law-making body, and that the guaranty is preserved "in retaining the substance of that form of trial as it was known and practiced among those from whom we derived it." In *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, we said that the guaranty means something more than the "preservation of the mere forms of trial by jury." In *State v. McClear*, 11 Nev. 39, it was said:

"We think that the term 'jury,' as it is used in the constitution, means twelve competent men who are free from all ties of consanguinity and all other relations that would tend to make them dependent on either party. It means twelve men who are not interested in the event of the suit, and who have no such bias or prejudice in favor of, or against, either party as would render them partial toward either party;"

and that the statute which took away the right of the state and the accused to challenge a juror for actual bias contravened the constitutional guaranty, in that the right of the parties to have the case tried by an impartial jury was of the essence and substance of the guaranty. We fully acquiesce in this view. In *Work v. State*, 2 Ohio St. 296, it is said that the term "jury" has been variously defined as "twelve good men and true," "neighbors and equals," "peers" of the parties to the litigation. In *Stokes v. People, etc.*, 53 N. Y. 164, 13 Am. Rep. 492, it was held that "the mode of procuring and impaneling" the jury may be regulated by statute, but that the right of trial by an impartial jury must be preserved. In *People v. Harding*, 53 Mich. 48, 481, 18 N. W. 555, 19 N. W. 155, 51 Am. Rep. 95, the court said that all the essential incidents of trial by jury as it existed at the time of the adoption of the constitution are protected by the guaranty. In *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 60 Am. St. 450, 33 L. R. A. 487, it was said that the three essential attributes of a jury trial are numbers, impartiality, and unanimity.

In *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47

Pac. 958, 58 Am. St. 39, the principal question presented was whether a party was entitled to a jury trial in a *quo warranto* proceeding. Preliminary to giving a negative answer to that question, it was said that "the right of trial by jury as it existed in the territory at the time when the constitution was adopted should be continued unimpaired and inviolate." Elliott, J., speaking for the court in *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613, said that "matters of practice may always be changed and regulated by the legislature." In *Reese v. Knott*, 3 Utah 451, 24 Pac. 757, cited by appellant, it is held that the statute of the territory of Utah, providing that only taxpayers shall be eligible to jury service, is violative of the seventh amendment to the Federal constitution. The court in that case says *arguendo* that, if the legislature may require the juror to be a taxpayer, it may say that, before he is eligible he shall be worth $10,000, and that if the power to so fix the qualification is once conceded, it can be extended so as to become oppressive. We do not agree with either the conclusion or the reasoning of the court. We entertain no doubt that the standard of qualification for jury service might be so raised as to be subversive of the right of trial by jury. We think that the logic of the cases is that the *right* to a jury trial shall remain inviolate where the right existed when the constitution was adopted; that the term "jury" signifies a body of twelve impartial men, peers of the parties, and that the guaranty is that these essential features cannot be taken away by the law-making power. This, we think, has been the construction from the beginning. The legislature, in harmony with this view, has from time to time changed the qualifications of jurors, but has always preserved the essential and fundamental features of the jury system as we had it when the constitution was adopted. This, we think, satisfies the guaranty. See, also, 24 Cyc. 187.

The testimony of the state shows that the act charged was committed in a barn between the hours of ten and eleven

o'clock p. m., and that three boys were present. One of the boys was permitted to testify that, immediately after the crime charged had been committed and at the same place, the defendant attempted to commit a similar indecent act upon him. The admission of the latter testimony is assigned as error. "Evidence of another and distinct crime is admissible if it was committed as part of the same transaction, and forms a part of the *res gestae*." 12 Cyc. 407. In *State v. Gainor*, 84 Iowa 209, 50 N. W. 947, the defendant was prosecuted on a charge of murder in the first degree, and convicted of manslaughter. The witness testified that, immediately after the shooting, the defendant pointed his pistol at another party. The court held that the evidence "was essentially a part of the *res gestae*," and competent. See, also, Wigmore, Evidence, § 218; *People v. Mead*, 50 Mich. 228, 15 N. W. 95; *Wilkerson v. State*, 31 Tex. Cr. 86, 19 S. W. 903; *Blanton v. State*, 1 Wash. 265, 24 Pac. 439; *State v. Craemer*, 12 Wash. 217, 40 Pac. 944; *State v. Burton*, 27 Wash. 528, 67 Pac. 1097; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523. In the *Wilkerson* case, the appellant was convicted of the murder of his wife. The state was permitted to prove that, immediately after killing his wife and within forty steps of her dead body, the defendant shot and killed another person. The court said that the evidence of the second killing was competent as *res gestae*.

The appellant cites, in support of this assignment, *Buell v. Aberdeen State Bank*, 58 Wash. 407, 108 Pac. 951, and *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588. The objectionable evidence in these cases was not a part of the *res gestae*. We think the second act was admissible as a concomitant part of the criminal act charged in the information.

During the examination of one of the state's witnesses, a boy thirteen years of age, objections were several times interposed on the ground that the questions were leading. In ruling upon the objections, the court remarked: "Oh, the boy is only thirteen years of age." "This is a very young

witness, remember." "You can ask leading questions of a witness who is only thirteen years old." These remarks, it is said, are comments on the facts within the meaning of art. 4, § 16, of the constitution. We cannot accede to this view. The court was speaking to counsel, and had a right to assign a reason for his ruling. The boy had testified that he was only thirteen years of age, and there was no other testimony on that subject. In *State v. Gohl*, 46 Wash. 408, 90 Pac. 259, this court remarked upon the distinction between technical and prejudicial error. It said that the instructions "manifestly do comment on the facts, but erroneous instructions do not necessitate a reversal unless they tend in some manner to prejudice a party's cause before the jury;" and that a party was not prejudiced by a mere statement of an uncontroverted fact. It was further said that trial judges should scrupulously avoid such comment, but that appellate courts cannot reverse a judgment for error without prejudice. See, also, *State v. Belknap*, 44 Wash. 605, 87 Pac. 934. In *State v. Surry*, 23 Wash. 655, 63 Pac. 557, the court, speaking to the constitutional provision here invoked, said:

"But we do not think it was intended by this provision to prevent the judges from giving counsel the reasons for their rulings upon questions presented during the progress of a trial, or to prohibit them, in all cases, from stating, when necessary, the facts upon which they base their conclusions."

State v. Hyde, 20 Wash. 234, 55 Pac. 45; *State v. Crotts*, 22 Wash. 245, 60 Pac. 403; *State v. Thield*, 36 Wash. 365, 78 Pac. 919; *State v. De Pasquale*, 39 Wash. 260, 81 Pac. 689, and *State v. Phillips*, 59 Wash. 252, 109 Pac. 1047, cited by the appellant, were decided upon facts so dissimilar that they are not in point.

In *Hicks v. United States*, 2 Okl. Cr. 626, 103 Pac. 873, cited by the appellant, one Fred Warren was the only witness who connected the defendant with the crime charged. During his cross-examination, the trial judge interrupted counsel

and, among other things, said: "That boy is all right." At another time the judge said to the witness while still upon the witness stand: "After the trial is all over, I want to see you and your father in my room." The conduct of the judge was of course held to be error. Further comment on the case is unnecessary.

There is no merit in the assignment that the evidence is insufficient to support the verdict. Two boys who were eye-witnesses to the crime testified positively to its commission. A discussion of the evidence would be neither profitable nor edifying.

The state suggests that the appellant was sentenced under the wrong statute, and that he should have received a heavier sentence. That question cannot be reviewed on this appeal. The judgment is affirmed.

RUDKIN, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 8884. Department One. January 3, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK LEROY, *Appellant*.[1]

JURY—DRAWING—TIME FOR SERVICE—CHALLENGE TO PANEL. The requirement that a jury be drawn for "the ensuing month," is not so material as to invalidate a panel part of whom were drawn for the month of December, but not summoned until January, because there was no jury business for the month of December, in view of Rem. & Bal. Code, § 2140, providing that challenges to the panel shall only be allowed for a material departure from the prescribed forms (PARKER, J., dissenting).

CRIMINAL LAW—APPEAL—RECORD. Comment on the facts pending a motion to quash the jury panel cannot be assigned as error, when the jury had not been called to the box and the record does not show that any juror was present.

CONTINUANCE—DILIGENCE. A continuance is properly denied in a criminal case where the accused took no steps to secure a subpoena for witnesses until more than a month after the case was set for

[1]Reported in 112 Pac. 635.

trial, and the only diligence shown to secure witnesses living at a distance was the writing of letters a few days before the trial, with no excuse for the delay.

APPEAL—REVIEW—HARMLESS ERROR. It is not prejudicial error to refuse to strike out an immaterial opinion of a witness.

CRIMINAL LAW—EVIDENCE—IDENTITY. In a prosecution for burglary, in which a witness testified that the accused was wearing the witness' shoes, evidence that the witness had tried on and could wear the shoes identified as shoes left by the accused is admissible.

SAME. In a prosecution for burglary, evidence that an unidentified man was met at a certain place, and concealed himself, is admissible, where it appears from other evidence that the accused went in that direction, and where the incident, with other evidence, was a circumstance tending to connect him with the crime charged.

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated upon an immaterial statement of a witness as to trivial incidents which did not reach the dignity of evidence.

CRIMINAL LAW—EVIDENCE—OTHER CRIMES. Upon a prosecution of burglary, evidence of another burglary in the vicinity about the same time, and that articles then stolen, with burglar's tools, were found on the person of the accused, who was arrested shortly after taking a stage ride from that locality, is admissible to show that accused was in the vicinity and had opportunity to commit the crime.

CRIMINAL LAW—EVIDENCE—ESCAPE. Evidence of the accused's escape and recapture by the sheriff is admissible as a circumstance tending to show guilt.

BURGLARY—SECOND DEGREE—ELEMENTS OF OFFENSE. Under Rem. & Bal. Code, § 2579, defining burglary in the second degree as an entry of a dwelling with intent to commit some crime, under circumstances not amounting to burglary in the first degree, it is not essential to burglary in the second degree that it was committed in the nighttime.

Appeal from a judgment of the superior court for Okanogan county, Taylor, J., entered January 18, 1910, upon a trial and conviction of burglary in the second degree. Affirmed.

C. Burton and *E. C. Jennings*, for appellant.

William C. Brown, for respondent.

GOSE, J.—The defendant was convicted of the crime of burglary in the second degree. The charge is that, on or

about the 5th day of November, 1909, he feloniously broke and entered the dwelling house of William Plemmons, with intent to commit the crime of larceny therein, etc. After the return of the verdict, he was tried upon a supplemental information, and the jury found that he had been theretofore twice convicted of burglary. He has appealed from a judgment entered upon the verdicts.

On the second Saturday of November, 1909, under the direction of the superior judge, the county clerk drew from the jury box the names of twenty-four jurors to be summoned to serve for the ensuing month. A few days later, through pleas of guilty and the escape of the appellant from jail, it developed that there were no jury cases for hearing for the month of December, and the jurors were not summoned to serve in that month. On the second Saturday in December, twelve additional names were drawn by the county clerk under the directions of the superior judge, and the two panels thus drawn were summoned for service at the January, 1910, term of court.

The appellant's motion to quash the panel for irregularity in drawing the jury was overruled. It is contended that the panel drawn in the month of November could serve only in the following month, and that the appellant was prejudiced by the refusal of the court to sustain his motion. There is no merit in the contention. Laws of 1909, page 132, § 3 (Rem. & Bal. Code, § 101), requires the judge of a superior court to divide the county into not less than three, nor more than six, jury districts. It makes it the duty of the county clerk to make up a jury list in the month of July of each year, containing the names of all the qualified jurors in the county; to provide as many boxes as there are jury districts, numbered to correspond with the districts, and to deposit in each box slips of paper containing the names of the jurors for that district. Section 4 provides that terms of court shall commence on the first Monday of each month, unless postponed to a later date by order of the judge; that it

shall not be necessary to call a jury for any month unless the judge "shall consider that there is sufficient business to be submitted to a jury to require that one be called;" that where the judge of the superior court deems that the public business requires a jury term to be held, he shall require the clerk to draw a jury "to serve for the ensuing month;" that the names shall be drawn in equal numbers from each jury box; that the names of persons so drawn "to serve as jurors" shall be struck from the jury list, and shall not be called "to serve as jurors for five years," unless their service becomes necessary because there are not sufficient competent jurors remaining in the county who have not served within that time. Section 7 provides that, when a juror is excused from service for the causes enumerated in the section, his name shall be placed upon the jury list, and he shall be summoned to serve at the next succeeding jury term.

The precise contingency presented here is not covered by the letter of the statute. Rem. & Bal. Code, § 2140, provides that "challenges to the panel shall only be allowed for a material departure from the forms prescribed by law for the drawing and return of the jury." The departure from the statute was not a material one. Reading the statute as an entirety, it is apparent that its purpose is to distribute and equalize the burden of jury service; to secure a jury in all cases from the body of the county, and to avoid the evils that flow from an open venire and its attending mischief, the ever-present professional juror. This fact is emphasized by the provision in the act that an open venire shall not issue except by stipulation of the parties, made in open court, entered of record, and approved by the court.

"The statutory provisions with regard to making up the jury-list are ordinarily held to be merely directory, and errors and irregularities in failing to comply strictly with their provisions which are not prejudicial to the parties do not invalidate the list or furnish any ground for challenging the array; but a substantial compliance with the law is neces-

sary, and a disregard of the material provisions which make up the essential features of the system and are designed to secure and preserve a fair and impartial trial is not a mere irregularity, and is ground for challenging the array, even though it does not affirmatively appear that any injury has resulted therefrom." 24 Cyc. 217, 218.

"Statutory provisions respecting the drawing of the panel are generally regarded as directory merely, so that irregularities therein, unless plainly operating to the prejudice of the challenging party, form no ground for challenging the array." 1 Thompson, Trials, § 84.

In *State v. Krug*, 12 Wash. 288, 41 Pac. 126, speaking to the question of the failure of the county commissioners to select and certify the names of the grand jurors as directed by statute, this court said:

"Nothing appears in the record to indicate that the defendant was in any way injured by the action of the court, or that the grand jurors were not qualified grand jurors under the law. The qualification of a grand juror after all is the main question to decide, and that question could have been decided in each instance by an examination of the individual juror."

It is not claimed that the county had not been divided into jury districts, nor is it claimed that there was any departure from the terms of the statute in depositing the names of the jurors in the proper boxes, or in drawing their names from the jury boxes. The only deviation from the statute was in the time of the drawing of the first twenty-four names. We think there was a substantial compliance with the spirit of the statute. It is apparent that the material provisions which make up its essential features were not disregarded. What we have said disposes of the objection to the individual jurors, based upon the same ground.

Pending the argument on the motion to quash the panel, and before the jurors had been called to the box for examination as to their qualifications, the court inquired of counsel on what day the appellant broke jail. The contention that this was a comment on the facts in the presence of the jury

is untenable. It does not appear from the record that any juror was then in the court room.

The appellant was arrested on November 8, 1909, escaped from jail on November 17, and was recaptured and returned to jail on or about November 20. On December 6, he was arraigned, and counsel was appointed to defend him. On the following day he entered a plea of not guilty, and the trial was set for January 11, 1910. On January 4, the counsel first appointed to defend him withdrew his appearance, and other counsel was appointed in his stead, and the trial was reset for January 10. After the motion to quash the panel had been overruled, a motion for a continuance was presented and denied. This ruling is assigned as error. The actual trial began on January 11. The appellant took no steps to secure the issuance of a subpoena until January 6. After the case was set for trial, he had more than a month in which to secure the attendance of witnesses. He waited until within five days of the trial before taking out a subpoena. In his affidavit for a continuance, the appellant states that his witnesses are at Spokane. The sheriff stated in his answering affidavit that the appellant made no effort to obtain or locate these witnesses by correspondence with them, until January 8, when he handed him two letters, one addressed to one of the witnesses at Aetna, in Clarke county, Washington, and the other addressed to the other witness at Spokane. This was not due diligence. No excuse is shown for the delay. The court was diligent in appointing counsel to defend the appellant. There was no abuse of discretion in the denial of the motion.

The complaining witness testified that he left his house on the morning of November 5, and that, upon his return the following evening, he discovered that certain articles of personal property, including a jar of fruit, had been taken; that the next day he found the fruit jar at the spring near the house, partially empty; that "whoever it was had eaten all they wanted out of it and left it setting there," and that "I

found those shoes laying there in the draw below the spring where he had eaten his dinner, and there wasn't any one else that I know of that could have put them there." The appellant's counsel then asked that the statement, "there wasn't any one else that I know of that could have put them there," be stricken. The court remarked: "It is a matter of his opinion any way." This ruling is assigned as error. The statement about the shoes clearly refers to the unknown person who had eaten the fruit at the spring. While the statement was merely the opinion of the witness and immaterial, no prejudice resulted from the court's ruling.

A witness for the state testified that the appellant was then wearing the witness' shoes, and that the witness had tried on one of two shoes shown him; that it fit him, and that he could wear it. Error is suggested in the admission of this testimony. It does not clearly appear that the shoes identified by the witness are the shoes found at the spring; but assuming that they are, as the argument suggests, there was no error in admitting the testimony. *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382. The appellant argues that the fact that the witness could put on one of the shoes, does not prove that he could wear them. Whether it tended to prove that fact was a question for the jury.

Another witness for the state testified that, the day following a burglary of the Gillespie store at Brewster, he was driving a stage from Okanogan to Brewster; that he observed a man near the road; that when the latter saw the witness, he turned and went into a bunch of brush and lay down; that the man had his hat over his face so as to conceal it, and that he could not identify him. The admission of this testimony is assigned as error. Plemmons, the complaining witness, had testified that the day after the articles were taken from his house, he followed tracks leading from his house to a point above the Davis place, and above the bench near his house. The witness further said that he had heard Mr. Plemmons' testimony; that he was slightly acquainted with

the country in the vicinity of the Plemmons house; and that the tracks Plemmons described, if continued in the course indicated, would reach the stage road at the point where he saw the unknown man. The appellant says that this evidence does not tend to connect him with the crime charged. It must be admitted that standing alone it has no probative force, but as we shall see later, taken in connection with other evidence in the case, it is a circumstance tending to connect the appellant with the Plemmons burglary. The reference to the burglary at Brewster was only for the purpose of enabling the witness to fix the date he saw the man near the stage road.

Another witness testified that he saw a man in Brewster the day before the safe was broken, who wore a mackinaw coat and had two weeks' growth of beard. This statement was made by the witness in answer to a question whether he saw a man in Brewster, about November 4 or 5, who resembled the appellant. The statement does not reach the dignity of evidence, tends in no way to identify the appellant, and of course could not have been prejudicial. Trial by jury would be a farce if prejudice were presumed from such trivial incidents of the trial. There is, however, other competent evidence to the effect that the appellant, at and before the time of his arrest, wore a mackinaw coat, and that he had a short growth of beard.

A witness for the state testified that in the early morning of the 5th day of November, 1909, the safe in his store at Brewster was blown open and the key to the back door taken. He was then shown a key taken from the possession of the appellant at the time of his arrest, and testified that he believed it was his key. He also identified certain knives taken from the appellant as his (witness') property, and stated that a steel wedge, similar to those found upon the appellant, was left in his store the morning the burglary was committed. It is contended that it was error to permit the witness to state that his safe was blown open. The purpose of the testi-

mony was to show that the appellant was in the vicinity of the Plemmons house a short time before the commission of the crime charged. Brewster is about ten miles from the Plemmons house. A stage road extends northerly from Brewster to Conconully and passes near the Plemmons house. As we have seen, the house was entered between the morning of November 5 and the evening of November 6. On November 6 the appellant took passage on the stage north of the Plemmons house, and was carried to Conconully the same day. On the morning of November 8 he was arrested at that place. He had in his possession when arrested a number of the articles taken from the Plemmons house, and also a set of burglar's tools. The case was tried on circumstantial evidence, and the purpose of this testimony was to fix the whereabouts of the appellant about the time the Plemmons house was entered. In short, its purpose was to show that the appellant was in the vicinity and had the opportunity to commit the crime charged. The matter of the burglary, the key, the knives and the wedge, tended to identify and locate him. If the appellant left a trail of crime behind him, the misfortune is his, and that fact cannot defeat the right of the state to connect him with the crime charged by proofs of all relevant circumstances. *State v. Dana*, 59 Wash. 30, 109 Pac. 191; 12 Cyc. 406-7. Testimony otherwise relevant does not become incompetent because it may tend incidentally to show that the accused has committed another crime. *State v. Hyde*, 22 Wash. 551, 61 Pac. 719; *State v. Norris*, 27 Wash. 453, 67 Pac. 983. The appellant has cited *State v. Thompson*, 14 Wash. 285, 44 Pac. 533; *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523. The principle we have stated is recognized in these cases. They also announce the familiar rule that proof of a previous independent crime is not admissible for the purpose of proving the crime charged.

The testimony of the sheriff, showing the escape and re-

capture of the appellant, was admissible as a circumstance tending to establish his guilt, and the error assigned to its admission is not meritorious.

It is further contended that burglary in the second degree, as defined in Rem. & Bal. Code, § 2579, must be committed in the nighttime, and that the court should have so instructed the jury. A comparison of the statute defining burglary in the first degree (Rem. & Bal. Code, § 2578), with that defining the second degree offense makes it apparent that the construction suggested is not warranted by the language used. The statute makes an entry, or a breaking and entry of a dwelling house with intent to commit some crime, under circumstances not amounting to burglary in the first degree, burglary in the second degree. There is abundant evidence which warranted the jury in finding either an entry, or a breaking and entry, of the dwelling house of Plemmons with intent to commit some crime. Indeed, it is conclusively shown that his dwelling house, which he had locked before leaving, was entered during his absence, and that several articles of personal property were taken and found in the possession of appellant at Conconully, two days later. The circumstantial evidence of the guilt of the appellant amounts almost to a demonstration. The plea of not guilty under the law left all defenses open, and the duty was imposed upon the state of anticipating any defense he might offer, such as an alibi or that he came lawfully into possession of the property of the complaining witness. To meet the burden, some circumstances, unimportant standing alone but possessing strength in connection with the other circumstances shown, were submitted to the jury. If it be conceded that some of the circumstances were so slight as to be immaterial, they were not prejudicial. Convictions in criminal cases will not be set aside for mere technical error which could not have worked prejudice to the accused.

The judgment is affirmed.

Rudkin, C. J., Fullerton, and Mount, JJ., concur.

PARKER, J. (dissenting)—I dissent. I think that both the letter and the spirit of the statute were violated in compelling the accused to be tried by jurors who were drawn in November. The jurors then drawn were drawn for service during the "*ensuing month*" of December. The fact that after their drawing it developed that there would be no business for them during that month was no warrant for using them in January. To some this may seem technical, but it is a technicality which can easily be avoided, and the principle which will allow the time of drawing to be thus departed from will allow the substantial rights of the accused to be violated, even if it be said they were not in this case, though I think they clearly were.

[No. 8992. Department One. January 4, 1911.]

PHILIP S. BARKLEY, *Appellant*, v. AMERICAN SAVINGS BANK & TRUST COMPANY, *Respondent*.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY—EFFECT OF DIVORCE. Upon the granting of a divorce without making any disposition of property, the community is dissolved and the parties become tenants in common of the community property.

APPEAL—REVIEW—FINDINGS. In the absence of the evidence, findings to the effect that certain property of a divorced couple had been their community property cannot be disturbed on appeal, although in the divorce case it was found that there was no community property.

ESTOPPEL—JUDICIAL PROCEEDINGS—HUSBAND AND WIFE—RIGHTS AFTER DIVORCE. Findings in a divorce case that there was no community property would not estop the wife from claiming certain property if she had in fact claimed it in good faith in the divorce case.

HUSBAND AND WIFE—COMMUNITY PROPERTY—RIGHTS AFTER DIVORCE—CONVERSION. After a divorce, whereby a husband's control over community property ceased and his interest became that of a tenant in common by operation of law, he can recover for a conversion prior to the divorce no more than the value of his half interest.

[1]Reported in 112 Pac. 495.

BILLS AND NOTES—INDORSEES—HUSBAND AND WIFE—COMMUNITY PROPERTY. *Semble*, that a husband and wife, as joint indorsees of a negotiable instrument, sustain the same relation to a third party in reference to it as any other joint holders, irrespective of community rights.

Appeal by plaintiff from a judgment of the superior court for King county, Ronald, J., entered February 5, 1910, upon findings in favor of the plaintiff, for part of his claim, after a trial on the merits before the court without a jury, in an action for conversion. Affirmed.

Faben & Kelleran, for appellant.

Farrell, Kane, and *Stratton*, for respondent.

GOSE, J.—This action was brought by the plaintiff, to recover damages for the amount of a draft which he alleges the defendant converted. There was a judgment for the plaintiff for one-half of the amount of the draft, with interest and costs, and he has appealed.

The court found that the appellant and his wife, S. A. Barkley, were divorced at the suit of the wife, on the 18th day of July, 1908; that in 1903, a draft for $694.87 was drawn in favor of W. S. Upham, and endorsed by him to the order of the appellant and S. A. Barkley, they then being husband and wife and residents of this state; that the respondent collected the draft upon an endorsement by the wife for her husband and herself, she writing the husband's name upon the draft at the instance of the respondent; that the respondent then knew that the endorsees were husband and wife, and that she had no authority to endorse for the husband; that the respondent, after collecting the draft, issued a certificate of deposit for the amount to the wife; that thereafter and in September, 1907, she deposited the same with the respondent subject to her check; that on the date the decree of divorce was granted, there remained in the bank, of the proceeds of the draft, the sum of $259.02; and that the draft was the property of the community composed of the husband and

wife. The court further found that one of the findings in the divorce suit, in accordance with the allegations of the complaint, was that there was no community property.

The appellant contends that the draft was the personal property of the community, and that as such it was subject to his management and control, and that he had the same power of disposition over it as he had of his separate property. Assuming that it was community property before the divorce was granted, under the uniform holdings of this court it thereafter ceased to be such. The entry of the divorce decree dissolved the community, and the appellant could not continue as manager of an entity that had ceased to exist. In *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A (N. S.) 103, it was held that, after the divorce, there is no community, and in the nature of things, no community property; and that, when the community property is not brought before the divorce court for adjudication, the former spouses thereafter hold it in equal shares as tenants in common. *Graves v. Graves*, 48 Wash. 664, 94 Pac. 481, and *James v. James*, 51 Wash. 60, 97 Pac. 1113, are to the same effect.

It is also contended that the allegations in the divorce complaint and the finding of the divorce court in response thereto, that there was no community property, estop the wife and those claiming through or under her from asserting the contrary. *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635, is cited in support of this view. The point is not well taken. The case is here for review upon the findings of fact and conclusions of law only. In the absence of the evidence, we will accept the findings as conclusive. It may well be that the wife was asserting ownership of the draft in the divorce proceedings in good faith. If so, it is apparent that such a course would not work an estoppel. The other authorities cited by the appellant have reference to the power of the husband over the community property while the marriage relation exists, and are not applicable to the issue before us.

The argument that, as against the respondent, the appellant can recover the full amount of the draft, is not sound. Assuming that there was a conversion when the proceeds of the draft were paid to the wife, and that the husband could then have recovered from the respondent the full amount thereof, it is obvious that, since his control over the community property terminated and his interest has become fixed by operation of law, he can recover no more than the value of his interest in the draft. He is now in the same position he would have occupied had he sold a half interest in the cause of action before commencing his suit. It is clear that the respondent is subrogated to the rights of the wife.

We have treated the case as though the draft was controlled by the law pertaining to community property, inasmuch as the parties and the court below so treated it. It is the opinion of the writer, however, that the husband and wife, as joint indorsees of a negotiable instrument, sustained the same relation to a third party in reference to it as any other joint holders of a negotiable instrument would occupy. This view, however, would lead to the same end.

The judgment is affirmed.

CHADWICK, FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 8916. Department Two. January 4, 1911.]

H. N. Clemens, *Respondent*, v. E. H. Stanton Company, *Appellant*.[1]

Pleading—Demurrer—Waiver by Pleading Over. In an action to recover on a sight draft, a demurrer to the complaint, on the ground that an acceptance in writing was not alleged, is waived by pleading over, admitting the execution of the draft and setting up a partial failure of consideration through a mutual mistake.

Bills and Notes—Drafts by Agent on Principal—Rights of Holder. Where a sight draft is drawn by an agent upon his principal in payment of logs purchased for the drawee, the effect is that of a bill drawn upon the drawer himself, which the holder may treat as a promissory note, under Rem. & Bal. Code, § 3520.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 27, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Merritt, Oswald & Merritt, for appellant.

Geo. E. Canfield, for respondent.

Crow, J.—In his complaint the plaintiff, H. N. Clemens, in substance alleged that the defendant E. H. Stanton Company is a corporation engaged in the general butchering and meat packing business, the defendant E. F. Humason being its agent to buy live stock; that on September 13, 1909, E. H. Stanton Company, by its agent Humason, bought a drove of hogs from plaintiff, and in payment delivered to him a draft, in words and figures as follows, to wit:

"$1688.10. (Buyers' Draft.) No. 129.
"Spokane, Wash., Sept. 13, 1909.

"E. H. Stanton Company, at three days sight, pay to the order of H. N. Clemens Sixteen hundred eighty-eight 10-100 Dollars, for hogs.
Payable at the Spokane & Eastern Trust Co., Spokane, Wash.
To E. H. Stanton Company, 212 Bernard St., Spokane, Wash. (Signed) E. F. Humason."

[1]Reported in 112 Pac. 494.

that the draft at its maturity was presented for payment, which was refused, and that it was duly protested. To this complaint E. H. Stanton Company interposed a demurrer, which was overruled. Thereafter, answering the complaint, E. H. Stanton Company admitted the agency of Humason, the sale by plaintiff, the execution of the draft, and alleged that on September 13, 1909, Humason as its agent purchased from plaintiff 91 head of hogs, which were shipped from Hay to Spokane, Washington; that before shipment they were weighed on an old, dilapidated, and incorrect set of scales at Hay, which incorrectly registered their weight as 19,860 pounds, showing their value to be $1,688.10;

"That said plaintiff and said defendant Humason mutually believing that said scales had weighed said hogs correctly and believing the fact to be that said hogs did actually weigh 19,860 pounds and acting upon such mutual belief and believing that there would be due the plaintiff $1,688.10, said defendant made and delivered said sight draft to plaintiff and plaintiff received and accepted the same in said sum; both the plaintiff and said Humason believing that said sight draft was for the sum to which plaintiff would be entitled for said hogs at the price of 8½ cents per pound;"

that the hogs were again weighed at Spokane on September 15, 1909, with the result that their correct weight was ascertained to be 16,945 pounds; that in addition thereto the defendant E. H. Stanton Company allowed plaintiff 750 pounds for shrinkage incurred during shipment; that it informed plaintiff of the mistake, asked him to again weigh the hogs, which he refused to do, and that it was ready, willing and able to pay plaintiff $1,504, their true value, which sum with accrued costs it tendered into court. The cause was tried to a jury. At the close of all the evidence, the action was dismissed as to the defendant Humason, it being conceded that he had acted as agent only. A verdict was returned against E. H. Stanton Company for the full amount claimed. Final judgment was entered thereon, and E. H. Stanton Company has appealed.

Appellant's controlling assignment is that the trial court erred in overruling its demurrer. It contends that respondent attempted to plead a cause of action upon an inland bill of exchange drawn by Humason upon appellant, and that to charge appellant its acceptance in writing should have been alleged. Appellant did not elect to stand upon its demurrer, but interposed an answer admitting Humason's agency, the sale to appellant, the agreed price of 8½ cents per pound; alleging that appellant's agent had executed the draft, and that there had been a partial failure of consideration, caused by the mutual mistake in weight. With the pleadings in this condition, the only issue was the correct weight. That issue was tried and determined in respondent's favor. The complaint not only contains allegations sufficient to state a cause of action for the purchase price of the hogs, but must be sustained if construed as intended only to state a cause of action on the written instrument. It alleges Humason was appellant's agent, and that as such he executed the draft. His act was appellant's act; the draft therefore was in effect drawn by appellant upon itself.

"A bill may be drawn upon the drawer himself, and is then in effect the promissory note or the accepted bill of the drawer, at the holder's election; and this is true in general of a bill or draft drawn by a principal on his agent, by an agent on his principal, or, in the principal's business, by one agent on another, and of a bill drawn by one partner on his firm." 7 Cyc. 569, and cases cited.

Under the facts here pleaded, nothing other than a drawing of the bill by appellant upon itself and its delivery to respondent in payment for the hogs sold to appellant could have been, or was, intended. Rem. & Bal. Code, § 3520, reads as follows:

"Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note."

The bill herein drawn by appellant through its authorized agent upon itself could be, and was, treated by respondent

either as a bill of exchange or a promissory note upon which appellant would be liable.

The judgment is affirmed.

DUNBAR and MORRIS, JJ., concur.

RUDKIN, C. J., and CHADWICK, J. (concurring)—We express no opinion as to the right of the respondent to recover on the draft or bill of exchange as such, but inasmuch as the only issue between the parties was fully tried out on the merits, we concur in the result.

[No. 8917. Department Two. January 4, 1911.]

H. H. JONES, *Respondent*, v. W. H. KEHOE, *Appellant*.[1]

FRAUDS, STATUTE OF—BROKERS—COMMISSIONS—ORAL CONTRACT. Rem. & Bal. Code, § 5289, providing that an agreement employing an agent or broker to sell real estate for compensation or commissions shall be void unless in writing, applies only to contracts between the owner of the land and the agent to sell, and an oral contract between brokers to divide commissions is valid.

APPEAL—REVIEW—FINDINGS. Findings upon absolutely conflicting evidence where the trial judge saw the witnesses will not be disturbed on appeal.

BROKERS—CONTRACT FOR COMMISSIONS. A contract between brokers to divide commissions on a certain sale means net commissions, after deducting necessary expenses.

ESTOPPEL—ADMISSIONS. A broker having stated his expense in connection with a sale to be $200, cannot claim $300 therefor.

COST—ON APPEAL—MODIFICATION OF JUDGMENT. A reduction of $100 from a $400 judgment is such a substantial reduction as to carry costs on appeal.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered October 30, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Modified.

[1]Reported in 112 Pac. 497.

Carl W. Swanson, for appellant.

Attwood A. Kirby, for respondent.

DUNBAR, J.—The complaint in this case alleged, in brief, that the plaintiff and defendant were each engaged in the real estate business in the city of Spokane; that they entered into a parol agreement wherein defendant agreed with the plaintiff that, if plaintiff would furnish him (the defendant) a purchaser for certain farm lands that defendant had listed or might list for sale, he (the defendant) would in consideration thereof, in event he succeeded in making a sale of said lands to such purchaser procured by plaintiff, pay to plaintiff one-half of the commission received by him for negotiating and closing the sale of said lands; that the purchaser was procured; that the sale was made by the defendant; that he received therefrom $900 as commission, and refused to pay over to the plaintiff any part of said commission except the amount of $50; and demanded $400, with interest at the legal rate from the time of the sale. The answer was a general denial. The case was tried by the court without a jury, and the court found, that the agreement set forth in the complaint was entered into between the plaintiff and defendant; that the plaintiff procured and furnished the defendant a purchaser; that the defendant sold said land to such purchaser and received as commission from said sale $900; that he neglected and refused to pay plaintiff one-half of the said commission, or any part thereof, except the sum of $50; concluded that the plaintiff was entitled to the sum of $400, and judgment was entered in accordance therewith. From this judgment, this appeal is taken.

At the commencement of the trial, the appellant objected to any testimony under the complaint, for the reason that the agreement was void under the provisions of the Laws of 1905, page 110 (Rem. & Bal. Code, § 5289), which provided that an agreement authorizing the employing of an agent or broker to sell or purchase real estate for compensation or

commission shall be void unless in writing. From an examination of this statute, we are of the opinion that the law applies only to contracts between the owner of the land and the agent who sells or agrees to sell the same, and that it does not apply between two brokers or real estate men.

The only other question presented involves the correctness of the findings of the court. The testimony was absolutely conflicting on all essential propositions. The testimony of both respondent and appellant was somewhat inconsistent in some particulars, and had such testimony stood alone it is doubtful if the respondent should have prevailed. But that of respondent was strengthened by a straightforward statement of one Brown, who substantiated in all particulars the testimony of the respondent. It is true that Brown was a party in interest, the respondent having agreed to divide his half of the commission with him if he would assist him in procuring a purchaser for the land. But, of course, the appellant was also a party in interest. The court saw the witnesses on the stand, heard them testify, and under the circumstances we do not feel justified in disturbing the findings made.

There is one feature of the case, however, upon which the court made no findings, and which seems to have been disregarded. Conceding the right of the respondent to recover half of the commission under the contract, the appellant gave testimony to the effect that he had spent $300 necessary expenses incurred in selling this land, and, of course, regarding the spirit of the contract, the respondent would be entitled to only half the net commission obtained. The appellant stoutly maintained that this $300 was a necessary expense, but it seems probable that a portion of this expense was incurred in the transaction of other business. In any event, the appellant confessed that he stated to the respondent's attorneys when they were discussing this matter, that his expense in relation to this particular piece of land had been $200, and we think that he must be bound by this statement. We see no reason, however, why he should not have credit for the $200,

and the $50 which he had paid to the respondent after the sale and for which he was given credit by the court. With this deduction, the net commission would be $700, of which amount the respondent would be entitled to $350, $50 of which he has received.

The judgment will, therefore, be modified to that extent, the respondent obtaining judgment for $300. This being a substantial reduction of the judgment, considering the amount involved, the appellant will recover the costs of this appeal.

RUDKIN, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 8885. Department Two. January 4, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. J. E. CRADDICK, *Appellant*.[1]

CRIMINAL LAW—EVIDENCE OF OTHER CRIMES—FALSE PRETENSES. In a prosecution for obtaining money under false pretenses, through a conspiracy with a swindling clairvoyant who predicted and advised the investments, evidence of other similar offenses, committed by the same conspirators in the same way upon other dupes, is admissible to show that the acts were done as part of a general scheme of conspiracy to defraud, the unusual and extraordinary means employed making an exception to the general rule that evidence of other crimes is not admissible.

FALSE PRETENSES—EVIDENCE—CONSPIRACY—ADMISSION OF CODEFENDANT. In a prosecution for obtaining money under false pretenses through a conspiracy with a swindling clairvoyant, photographs of the latter, in oriental costume, with writings thereon, of which he was author, scoffing at the gullibility of his victims, are admissible in evidence.

FALSE PRETENSES—DEFENSES—RESTITUTION. In a prosecution for obtaining money under false pretenses for worthless stock, evidence of the value of land traded to the prosecuting witness in restitution is inadmissible, that being no defense.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered March 4, 1909, upon a trial and

[1]Reported in 112 Pac. 491.

conviction of obtaining money under false pretenses. Affirmed.

J. F. Blake and *John L. Willey*, for appellant.

Fred C. Pugh and *D. W. Hurn*, for respondent.

DUNBAR, J.—The information in this case charges, that the defendant, J. E. Craddick, and John Doe, *alias* Sahara, unlawfully and by false and fraudulent representations received from one Ed. Thompson $800 in money; that they represented that the Pinar Del Rio Mining Company was the owner of a gold mine situated in Okanogan county, Washington; that said mine had been opened, and that a ledge of ore about seventy-five feet in width had been discovered; that the extent of said ledge had not been ascertained because the same had not been cut out to its full extent; that said mine was located adjacent to, and immediately connected with, another mine of the same character, and was close to and in the immediate vicinity of the Alden mine, the Alden mine being one of the richest gold mines in the country, and that said Pinar Del Rio was located a short distance north of Oroville, state of Washington, in close proximity to a railroad; whereas, in truth and in fact, the said Pinar Del Rio mine had not been opened, and no ledge of ore of any kind or character had been struck, and said mine was not adjacent to or connected with any mine of like character or any other mine whatever, and was not close to, or in the immediate vicinity of, the said Alden mine, but was at least twenty-five miles distant therefrom; that in fact said mine was not located near Oroville, but was at least seventy-five miles distant therefrom; and in fact said mine was not located near any railroad line, but was at least seventy-five miles distant from a railroad line; that Thompson, then and there relying upon said representations and pretenses, paid to said Craddick and said Sahara the sum of $800, etc.

It is the claim of the state that the false and fraudulent representations and pretenses charged against the defendant

in the information are the direct result of a conspiracy entered into between Conlin *alias* Sahara, Sampson *alias* Haas, and defendant Craddick, to defraud generally any and all persons who might become patrons of the clairvoyant Sahara, and through his seductive influences and deceptive practices, seek of him advice as to how to make good, safe, and profitable investments of their savings. Under the arrangements made between them, Sahara was to furnish the purchasers; the defendant Craddick, the alleged profitable securities, and Sampson was the go-between, the man who introduced the one selected by Sahara as the probable victim to Craddick; and the spoils were to be divided equally between Sahara and Craddick, after the payment to Sampson of his commission out of the transaction. It appears that, in furtherance of the combination and to furnish investments, stock called "Brittle Silver" was used for a time, and after that stock had become too generally known, the Pinar Del Rio Mining Company was organized, and represented to be the owner of a gold mine in Okanogan county, of promising wealth such as we have described. The transaction between this trio and Thompson was proven. Thompson, after having been steered into Sahara's offices, consulted him concerning profitable investments. Sahara, after going into an alleged clairvoyant state, pretending to occult knowledge and vision, interspersing his performances with all the little tricks of the trade used for deceiving victims, pretended to Thompson to see by the aid of this extraordinary occult power a man who had stock to sell, the purchase of which would be very profitable to Thompson. This man was Craddick, the defendant in this case, and the result of the whole conspiracy was that, by reason of these representations and this fraudulent performance, Thompson, who was rather a credulous, ignorant Swede, invested his $800 in this worthless stock.

There could seem to be, from the testimony in this case, but one conclusion as to the guilt of this appellant, and his participation in this conspiracy to defraud. There are, however,

some technical questions that are raised by the appellant which we will notice. It is alleged that the court erred in permitting evidence tending to show a conspiracy between Sahara, Sampson, and Craddick; in permitting evidence tending to show the commission of similar offenses in inducing or attempting to induce Eric Johnson to invest in mining stock held by defendant; in permitting evidence tending to show the commission of similar offense in inducing or attempting to induce J. M. Wallace to invest in mining stock held by the defendant; in permitting evidence tending to show the commission of a similar offense in inducing or attempting to induce an unnamed person who had lumber to sell to invest in mining stock held by the defendant. These four assignments may all be considered together, and in this is embraced the question whether these alleged offenses were distinct, separate, and apart from the case as made, or attempted to be made, against the defendant, to such an extent that they could not be accepted in evidence as competent proof on the case charged, viz., the attempt to defraud Thompson. It is claimed that these were separate and distinct negotiations, in no way tending to prove the crime charged, and appellant relies upon the rule announced by this court in *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523, and *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588.

There is no doubt that the general rule is firmly established that it is not competent to show the commission of another distinct crime by the defendant for the purpose of proving that he is guilty of the crime charged. This would only go to the extent of proving his character, and under the general rule a defendant's character cannot be put in question except through his initiative. Under such circumstances, the defendant would be called upon to defend himself against crimes of which he had had no notice, and the effect of such testimony, as has often been said, would be to divert the

minds of the jurymen from the main question in issue, viz., whether the particular crime charged was proven.

As we interpret the cases above cited from this court, they only sustain the general rule recognizing the exception that, when the testimony offered tends to prove a general scheme for the perpetration of a crime similar to the one with which the defendant is charged, the testimony is admissible. In the prosecution of criminal actions a criminal intent must be found to exist, and such proof is admitted because the establishment of such a scheme, and crimes committed in pursuance thereof, affords grounds for inference against the defendant as to intent in the matter under examination. But, of course, the class of cases must be cognate, or it would result, as we have said, in convicting a man of one crime because he had been shown to be guilty of another. In *State v. Bokien, supra*, we held that, in a prosecution for obtaining goods under false pretenses by the giving of a check upon the bank in which the defendants had no funds, it was error to allow the prosecution to introduce testimony of other checks having been given by defendant to other persons when he had no funds or deposits. In *State v. Gottfreedson, supra*, it was held, in a prosecution for horse stealing, that it was error to admit testimony that defendant had stolen another horse at about the same time that the one for whose theft he was standing trial had been taken; because, as was said, the sole effect of the testimony would be to establish the bad character of the defendant and prejudice the jury against him. It seems plain that the ruling could not have been otherwise in this case, without violating the well-established rule.

The latest expression of opinion by the court on this subject is in *State v. Oppenheimer, supra*, where it was held that, upon a charge of obtaining money under false pretenses by means of making a collection upon a day named, falsely representing that the accused was an agent of the prosecuting witness and authorized to collect his accounts, evidence of similar collections from other parties, under similar fraudulent pre-

tenses, is inadmissible for the purpose of showing intent, or for any purpose, where there is nothing unusual or extraordinary in the means employed, and no connection between the collections made. In that case, *State v. Bokien* and *State v. Gottfreedson* were approved. But there was no attempt to overrule the case of *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042, where it was held that, in a prosecution for embezzling funds of an employer, evidence of other acts of the defendant, in giving receipts to patrons of his employer and making entries on the books for less amounts than the money received, was admissible for the purpose of showing a general scheme which he adopted in keeping his employer's accounts, as tending to show a system employed on his part in furthering such embezzlement. The decision in this case was virtually reaffirmed in the *Oppenheimer* case, by distinguishing it from the case there under consideration.

In the case at bar, there certainly is something unusual or extraordinary in the means employed, which would bring it within the exception mentioned in *State v. Oppenheimer*, and the testimony shows a more general and far-reaching scheme or system to defraud, not only the prosecuting witness in the particular case, but credulous people generally, than any case which has been called to our attention. The testimony objected to, so far as Eric Johnson is concerned, was that, through a conspiracy with Sahara and Sampson, the appellant defrauded Johnson out of a ranch valued at $15,000, as well as personal property connected with the ranch. In relation to the Wallace transaction, Mr. Wallace testified that he went to see Sahara as a fortune teller, and that Sahara told his fortune; that Sahara did not tell him much on the first visit, but encouraged him to come again, and that he did go again, and Sahara then told him that, if he would do as he directed, he could sell his place for him; that after going into one of these alleged trances, Sahara said: "I see a man come to see you in your place of business." The witness continued:

"He says, 'I can see him,' and he described the man. He

says he was a large man, probably weighed 175 to 180 pounds. He says, 'He wears glasses.' He says, 'He has a very thick, heavy nose.' He says, 'He is a powerfully built man.' He says, 'I can't tell you his name, but,' he says, 'the first letter of his name is C,' and he says, 'The next letter of his name is R.' 'But,' he says, 'it is the most peculiar thing that ever come to me,' he says, 'I can't tell you the rest of his name.' He says, 'He will come to see you some time this week.' "

It will be noticed that these letters are the first two letters in the defendant's name, and the descriptions was the description of the defendant, so that the dupe could readily recognize him when he put in an appearance. The testimony was that Craddick did appear, calling upon him at his place of business, and the result was that he sold him a lot of worthless stock. In the trance into which Sahara went, he scribbled off the words, "Brittle Silver stock," showed them to Wallace, and told him that, if it was possible for him to make a deal in any way with the man who called upon him and whom he had described, to make it. Such was the testimony in relation to the attempt of these three men, through the medium of this swindling clairvoyant, to defraud others. So that this case is not governed at all by the rules laid down in the cases cited by the appellant. There, there was no charge of any organized conspiracy, but they were all merely cases where the defendants had committed other crimes of a similar nature.

"The admission of evidence, in a trial for uttering counterfeit bills or base coin, of the utterance of similar bills or coin to other persons about the same time . . . is fully recognized in the courts of this state." *Commonwealth v. Jackson*, 132 Mass. 16.

See, also, *Commonwealth v. Stone*, 4 Met. 43; *Commonwealth v. Bigelow*, 8 Met. 235.

For the purpose of showing guilty knowledge in a class of cognate cases, where false plate or jewelry has been sold, evidence of other sales of similar ware is admissible. *Regina v. Francis*, L. R. 2 C. C. 128. Another exception to the general rule that independent crimes cannot be proved, is found

in that class of cases where acts are shown to have been done as part of the same plan or scheme of fraud. *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731. Where there was evidence of a conspiracy between the defendant and a deputy collector to defraud the revenue, by entering goods at an undervaluation, evidence of other transactions in the conduct of criminal enterprises was admissible. *Bottomley v. United States*, 1 Story 134. Where a conspiracy to defraud is alleged, other fraudulent purchases than those set out in the indictment, made about the same time and in pursuance of the conspiracy, are admissible for the purpose of showing the intent with which the goods were purchased. *Commonwealth v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596. And a great many cases involving the same principle are reported, too numerous for special citation.

While it is difficult sometimes to distinguish between the circumstances which properly fall within the rule and those which fall within the exception, it is universally held we think that, where the testimony offered shows an act committed in furtherance of a general scheme or conspiracy, the testimony is admissible. The rule is happily stated by Wharton, in his work on Criminal Evidence (9th ed.), § 32, where it is said, in discussing this question:

"In order to prove purpose on the defendant's part, system is relevant, and in order to prove system, isolated crimes are admissible from which system may be inferred."

See, also, *Yakima Valley Bank v. McCallister*, 37 Wash. 566, 79 Pac. 1119, 107 Am. St. 823, 1 L. R. A (N. S.) 1075.

We think there was no error in the admission of the testimony objected to.

It is also alleged that the court erred in admitting certain photographs of Sahara, with certain written legends shown on the margin. One of these exhibits is a photograph of Sahara in a sort of oriental costume, in a quiescent attitude, with the following written on the face of the photograph: " 'The great' waiting for a 'sod-buster' with sufficient shekels

to make it interesting." Another represented him in the same costume, apparently telling a woman's fortune from the lines in the palm of her hand, which he was closely scrutinizing, and on this card was written: "'The great' at work on a sucker." There were other photographs of similar character. It is a well-known psychological fact that tinsel and trappings and unaccustomed brilliant garbs make an impression on the ignorant mind. Sahara knew this. These things were a part of his stock in trade. They were aids to the perpetration of his frauds, and the jury had a right to be informed of any circumstance tending to prove the fraudulent scheme and the manner in which it was conducted. The writing on the photographs was a vaunting admission by Sahara of the falsity of his pretenses, and constituted a scoffing at the gullibility of his victims. There was competent testimony to the effect that he was the author of the writings.

It is also contended that the court erred in not permitting appellant to show the value of certain land which, just before the trial, he had traded to Thompson for the stock which he had sold him. The value could not have been material. If it had been proven that at that time appellant had returned to Thompson the $800 which he had obtained from him, with interest, it would not in any event have been a defense to the action. A thief will not be accorded immunity by the law by simply returning the stolen property when he finds that his crime has been discovered.

We have examined the other assignments of error, but find them entirely without merit. The judgment is affirmed.

RUDKIN, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 8933. Department Two. January 4, 1911.]

THE CITY OF TACOMA, *Respondent*, v. F. A. BOUTELLE, *Appellant*.[1]

STREET RAILROADS—REGULATION—SERVICE—REASONABLENESS. An ordinance providing the frequency of street car service does not change or destroy any specific or implied right granted in the company's franchise merely because it is more specific than the general power therefor which was reserved in the initiating ordinances.

SAME—BURDEN OF PROOF. The burden of establishing that the regulation of the frequency of street car service was so unreasonable as to be confiscatory is upon those asserting it.

SAME—FRANCHISE—SERVICE—SUFFICIENCY. A street railway franchise providing that the city council might require the cars to be run "sufficient round trips each day," must be construed with reference to the convenience of the public and the increase of population.

SAME—SERVICE—DETERMINATION OF SUFFICIENCY—LEGISLATIVE QUESTION. Where a street railway franchise provides that the city council might require the cars to be run "sufficient round trips each day" the determination of what is sufficient is a legislative question, subject to review by the courts as to the authority for and reasonableness of the act.

SAME—FRANCHISE—CONSTRUCTION—SERVICE. A provision in a street railway franchise requiring cars to run two round trips a day is an expression of the minimum service demanded of the then city, and not of an intention to not require more trips when the growth of the city requires it.

SAME—REASONABLENESS. There is nothing inherent in an ordinance requiring a ten and five minute street car service during certain hours which would authorize a court to hold it unreasonable as a matter of law.

CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACT—STREET RAILWAY FRANCHISE. An ordinance providing a reasonable frequency of street car service, does not impair the obligation of a franchise reserving the right to require the cars to make sufficient trips, or of a franchise prescribing a minimum service of two round trips a day.

[1]Reported in 112 Pac. 661.

STREET RAILROADS—FRANCHISES. A city may not, in granting a franchise to a street railway company, divest itself of its governmental police power the exercise of which is necessary for the public welfare or safety.

STREET RAILROADS—REGULATION OF SERVICE—POLICE POWER. Police power to regulate the frequency of street car service is conferred upon a city by Const., art. 11, § 11, providing that a city may enforce police regulations not in conflict with general law, and Rem. & Bal. Code, § 7507, subd. 9, authorizing the city to control its streets and regulate the operation of street railroads, and Id., subd. 36, granting it the right to provide for the punishment of practices dangerous to the public safety and to make necessary regulations for public health, peace and order, and punish persons violating any of the ordinances.

STREET RAILROADS—REGULATION—REASONABLENESS—VALIDITY. An ordinance regulating the frequency of street car service, and providing that every person violating the same shall be fined, is not void or oppressive as applied to a street car superintendent, where it is admitted that he was in charge of the running and operation of the street car system, there being nothing to show that the service required was unreasonable, and the penalty fixed being a fine not exceeding one hundred dollars (RUDKIN, C. J., and CHADWICK, J., dissenting).

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 8, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, convicting the defendant of violating an ordinance regulating the operation of street cars. Affirmed.

B. S. Grosscup and *W. C. Morrow*, for appellant. Ordinance No. 3,883 impairs the obligations of the contract and deprives the street railway company of its property without due process of law. *Commercial Elec. Light & Power Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592; *State ex rel. Grinsfelder v. Spokane St. R. Co.*, 19 Wash. 518, 53 Pac. 719, 67 Am. St. 739, 41 L. R. A. 515; *Troy v. Troy & L. R.*, 49 N. Y. 657; *Minneapolis v. Minneapolis St. R. Co.*, 215 U. S. 417. The passage of Ordinance No. 3,883 was not authorized under the specific provisions of the city charter conferring power over railroads and street railroads. *Tacoma Gas & Elec.*

Light Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655; *Ottawa v. Carey*, 108 U. S. 110, 121; *Detroit Citizens' St. R. Co. v. Detroit*, 110 Mich. 384, 68 N. W. 304, 64 Am. St. 350, 35 L. R. A. 859; *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063. Nor can the ordinance be supported as a valid exercise of the police power. Tiedeman, Police Power, § 212; Cooley, Constitutional Limitations (7th ed.), 265, 266; *Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413; *Excelsior v. Minneapolis & St. P. Sub. R. Co.*, 108 Minn. 409, 122 N. W. 486, 24 L. R. A. (N. S.) 1035; *Townsend v. Circleville*, 78 Ohio St. 122, 84 N. E. 792, 16 L. R. A. (N. S.) 914. The ordinance was also unreasonable. *Town of Oxanna v. Allen*, 90 Ala. 468, 8 South. 79; *Pittsburg etc. R. Co. v. Crown Point*, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; *Townsend v. Circleville, supra.*

T. L. Stiles, F. R. Baker, and *F. M. Carnahan*, for respondent.

Morris, J.—Appellant, the superintendent in charge of the running and operation of the street car system of the city of Tacoma, belonging to the Tacoma Railway & Power Company, was convicted of a violation of Ordinance No. 3,883 of said city, and prosecutes this appeal.

Said ordinance is as follows:

"An ordinance regulating the operation of certain street cars in the city of Tacoma by the Tacoma Railway & Power Company, and providing a penalty for the violation thereof.

"Whereas, the street railway service rendered by the Tacoma Railway & Power Company over its line from South Ninth street to Union avenue, South Tacoma, along 'C' street, Jefferson avenue, Pacific avenue, Delin street, 'G' street, South 38th street, 'M' street, South Fifty-sixth street, Railroad street and South Fifty-fourth street is inadequate, in that a sufficient number of cars are not operated to accommodate the number of passengers;

"Now, Therefore, be it ordained by the city of Tacoma:

"Section 1. That from and after October 5th, 1909, the Tacoma Railway & Power Company, its managers, servants

and agents, be required to operate at least one passenger street car each way every ten minutes between South Ninth street and Union avenue (South Tacoma), between the hours of 5:30 o'clock a. m., and 12:30 o'clock a. m., following, and one car each way every five minutes between the hours of 6 o'clock and 8 o'clock a. m., and between the hours of 5 o'clock and 7:30 o'clock p. m., over its line along South 'C' street, Jefferson avenue, Pacific avenue, Delin street, 'G' street, South Thirty-eighth street, 'M' street, South Fifty-sixth street, Railroad street and South Fifty-fourth street.

"Section 2. Every person violating the provisions of this ordinance shall, on conviction thereof, be fined in any sum not exceeding one hundred dollars.

"Section 3. Each day's failure of said Tacoma Railway & Power Company to comply with the provisions of this ordinance shall constitute a separate offense."

Appellant urges two grounds of error: (1) The ordinance is unconstitutional, and violates the guaranties of both the state and Federal constitution, in that it seeks to impair the obligations of a contract and to deprive the street railway company of its property without due process of law; and (2) the city was without authority to pass the ordinance, it was not authorized under the specific provisions of the city charter conferring power over street railways, nor can it be sustained as a valid exercise of the police power.

The street railway line referred to in the ordinance, from South Ninth street to Union avenue, South Tacoma, is known as the South Tacoma line, and is operated over portions of ten different streets. The right to operate over these different streets was conferred by three different ordinances, passed at as many different times, and containing different provisions and conditions affecting the franchise therein granted. The tracks on Jefferson avenue, Pacific avenue, and C street are operated under franchise granted by Ordinance No. 152 as amended by Ordinance No. 238. This ordinance was passed in 1887, and § 5, as amended in 1889, provides as follows:

"The city council may regulate the speed for running the

cars and may require the cars to be run on or over the lines of said railways sufficient round trips each day, and no cars shall be allowed at any time to stop and remain upon any intersection of streets for a longer period than three minutes, and any violation of the provisions of this section shall subject the owners of said railways to a fine of not less than five or more than twenty-five dollars for every offense upon conviction thereof before any court having jurisdiction."

The tracks on Delin and G streets are operated under Ordinance No. 188, passed in 1888, § 6 of which is as follows:

"The city council may regulate the speed for running the cars and may require cars to be run two round trips each day on all completed portions of said railway after one mile thereof is completed. No car shall be allowed at any time to stop or remain upon any street intersection. The fare upon said railway over the whole, or any part thereof, shall not exceed five cents for each passenger, including ordinary personal hand baggage. Any violation of the provisions of this section shall subject the owners of said railway to a fine of not less than five or more than twenty-five dollars for every offense, upon conviction thereof before any court having jurisdiction."

The franchise for the remaining streets was granted by Ordinance No. 860, passed in 1893, § 12 of which is as follows:

"Nothing in this ordinance shall be so construed as to prevent the city council of the city of Tacoma from passing all ordinances and resolutions necessary for the protection of the interests of the city, and to carry out the spirit and provisions of this franchise or ordinance, or from granting to any other street railway the right to cross the tracks of the line or lines of this railway at the same grade."

Appellant's contention is that Ordinance No 3,883, in providing for a five-minute service over the entire South Tacoma line, is an attempted impairment of the obligation of the contracts between the city and the railway company, as established by the various franchises; that as to the first group of streets, the city is not authorized by the franchise to determine what shall be "sufficient round trips each day," as

provided for in § 5, *supra*; that such clause does not confer upon the council the right to determine arbitrarily the number of round trips each day that will be sufficient; but that the determination of that matter presents a judicial rather than a legislative question; that as to the second group of streets, the provision of § 6, *supra*, investing the city council with power to "require cars to be run two round trips each day," is a manifest expression of intention on the part of the council that it reserved no authority to require a more frequent service than two round trips a day; that the third group of streets controlled by the provisions of § 12, *supra*, have no reservation whatever as to any authority in the council to require any specific degree of service, or to determine what should be a sufficient service, there being no expressed intention in § 12 to reserve any such power; that inasmuch as, in the ordinances governing the first two groups of streets, a specific authority had been declared, the omission of such declaration in the ordinance governing the third group was intentional and deliberate.

The suggestion first advanced in support of these contentions is that a franchise grant to a public service corporation is in the nature of a contract, equally binding upon both the city and the railway company, and that an attempt of the city to abrogate any of the rights conferred by the passage of a subsequent ordinance is an impairment of a contract obligation and hence void. So far as being a correct statement of the law, the above position may be admitted, but in our opinion it has no place in the determination of the question before us.

A good illustration of the correct application of the above rule of law may be found in *Minneapolis v. Minneapolis St. R. Co.*, 215 U. S. 417, cited by appellant as supporting his application of the rule. In 1875 the city of Minneapolis gave a franchise to the railway company for fifty years, by the terms of which the company had the right to charge a fare not exceeding five cents on any continuous line not exceeding

three miles in length. In 1907 the city council enacted an ordinance requiring the railway company to sell six tickets for twenty-five cents, which ordinance was held to be void as impairing the obligation of a contract. The right to charge a five-cent fare was a specific grant of the franchise, and the city could no more violate such a specific grant than it could abrogate the franchise itself. As was said by Chadwick, J., in *Peterson v. Tacoma R. & Power Co.*, 60 Wash. 406, 111 Pac. 338, in reviewing this same case, "the right to charge the fare provided in the franchise was of the essence of the contract, and that it could not be abridged by the city." We have confronting us in the present case no attempt on the part of the city to change or destroy by Ordinance No. 3,883 any specific or implied right, vested in the railway company under any previous ordinances; but rather an enactment under a general power expressly reserved in each of the original ordinances.

The fact that the provisions of Ordinance No. 3,883 are more specific than the expression of the general power reserved in the initiating ordinances does not destroy the specific enactment, but leaves for determination the question whether such specific requirement is reasonable. If so, it will be sustained; if not, it will be held invalid. Elliott, Railroads, 1624. And "the question of reasonableness usually resolves itself into this: Is the regulation carried to a point where it becomes prohibition, destruction, or confiscation." Freund, Police Power, 61. Reasonableness in this connection is a question of fact, and will be presumed, the burden of proof being upon those asserting unreasonableness, of which there was no evidence in this case.

In *People v. Detroit Citizens' St. R. Co.*, 116 Mich. 132, 74 N. W. 520, an ordinance was passed in 1897, requiring the railway company to maintain a six-minute service on certain streets between prescribed hours, under a franchise granted the railway company in 1862. It was provided that cars should be run as often as public convenience required, but

not oftener than once in twenty minutes. Another provision of the franchise reserved the right to the city to make such further regulations as may be deemed necessary to protect the safety, welfare, and accommodation of the public. This franchise was amended in 1879, extending its life and providing that cars on all lines subject to the ordinance should be operated as public convenience required. The railway company contended, when it was sought to enforce the six-minute service, as appellant here contends, that the city had no power to pass such an ordinance, and that the franchise constituted an inviolable contract, under which they could only be compelled to run cars every twenty minutes. In passing upon this contention, the court referred to the fact that Detroit, in 1862, was a city of about 50,000 people. Its residents all lived within a comparatively short distance of the business center, and it was probably believed that the time fixed for the running of the cars would fully answer the convenience and demands of the people. It was then held that, in view of the increased population of the city, with the consequent demands for a quicker and more convenient street railway service, together with the provisions of the amendment of 1879, the ordinance was valid, and a reasonable determination of the power vested in the common council.

A like argument might well be used in referring to the city of Tacoma in 1887 and 1888, the years of the passage of the first two ordinances, one of which provided that the city council might require the cars to be run "sufficient round trips each day," and the other "two round trips each day." Sufficient for what? Manifestly not for the convenience of the railway company, but the convenience and demands for reasonable transportation on the part of the residents of the city whose inhabitants at that time looked forward to its becoming a great city before the life of the granted franchise had expired; and as it increased in population, so would there be an increased demand for an improved street railway service, recognized by the city in reserving to itself,

as it did in the first franchise, the right to require "sufficient round trips each day" to accommodate the necessities of its residents and their demands for a proper public service.

Nor is this a question for judicial determination, as contended by appellant, but what would be "sufficient round trips each day" is purely a legislative question to be determined and solved by the common council of the city, subject to a review by the courts upon the question of the authority and reasonableness of its act. So the provisions of the second ordinance, requiring cars to run two round trips a day, is not, as contended for by appellant, the expression of an intention to not require more trips; it is nothing more than an expression of the minimum service regarded by the city as being sufficient for the demands of the then city in the territory covered by the franchise. As to the third provision found in § 12 of Ordinance 860, appellant contends it to be simply a declaration of a reservation of the police power. If it is such a declaration, then such a reservation, if needful, would be ample to invest the city with full power to pass Ordinance No. 3,883, as we shall argue more fully hereafter.

Referring again to the rule of "reasonableness," as determinative of the effect of subsequent requirements upon franchise regulation, a good case may be found in *State, Trenton Horse R. Co. v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410. The charter of the city of Trenton conferred general power to pass ordinances necessary and proper for the good government, order, and protection of persons and property; also power to prescribe the manner in which corporations should exercise any granted privilege in the use of the streets. Under these grants the city based its right to pass an ordinance requiring horse railways to have an agent, in addition to the driver on each car. The ordinance being attacked for lack of power, the court held that neither of the above enumerated powers added anything to the right of the city to exercise the police power, and the

only question to be considered was the reasonableness of the ordinance, and, if reasonable, no special delegation of power was required to vindicate it; and added:

"In concluding whether the ordinance under consideration is a reasonable precaution in favor of the public safety and order, we must regard it in the light of the following conditions which surround the question: First. A rule of construction to be applied is, that when an ordinance is passed upon a matter clearly within a general power, the presumption is in favor of its reasonableness. The judicial power to declare it void can only be exerted when from the inherent character of the ordinance or from evidence taken showing its operation it is demonstrated to be unreasonable."

See, also, *Mayor etc. of New York v. Dry-Dock E. B. & B. R. Co.*, 133 N. Y. 104, 30 N. E. 563, 28 Am. St. 609; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *North Jersey St. R. Co. v. Jersey City*, 75 N. J. L. 349, 67 Atl. 1072.

In the present case there was no attempt to show Ordinance No. 3,883 was unreasonable. Nor is there in its inherent character anything which would move the court to hold it unreasonable as a matter of law, and thus declare it void. We, therefore, hold upon the first point reserved by appellant, that the ordinance in question is not an attempt to impair the obligations of a contract, and therefore void.

Much of the second assignment of error is involved in what has already been said. We will, however, discuss it more in detail. All courts concede the impossibility of adopting fixed rules by which to test the validity of laws passed under the police power. It covers a wide range of subjects, but is especially occupied with whatever affects the peace, security, health, morals, and general welfare of a community. While originally it was used as a rule to indicate the protective function of the government, its development of late years has been in the direction of the function of the state that cares for the general welfare. Social Progress & the Police Power, 36 Am. Law Review, 681. As was said by Chadwick, J., in *Bowes v. Aberdeen*, 58 Wash. 535, 109 Pac. 369:

"Its exercise in proper cases marks the growth and development of the law rather than, as some assert, a tyrannical assertion of governmental powers denied by our written constitution."

In its broadest acceptation it means the general power of the state to preserve and promote the public welfare, even at the expense of private rights. *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345. That it, when generally reserved, vests ample power in the common council of a city, having in mind the general welfare of the traveling public, and the health and safety of the citizen, endangered by crowded and heavily loaded cars, to determine by ordinance the frequency with which cars should be run upon the public streets, is to our mind demonstrated both upon principle and by authority. In *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, the court held that a general reservation in a franchise to make such regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the city and public, while not sufficient to permit the city to pass an ordinance changing the rate of fare, was ample in regard to all matters incident to the operation of the road such as "in the interest of public travel, the frequency with which cars should be run for the public convenience." Such a reservation is not as broad as that contained in Ordinance No. 152, *supra;* nor it is in effect any broader than the reservations contained in Ordinances Nos. 188 and 860. In *Lawton v. Steele*, 152 U. S. 133, the court says the police power is universally conceded to include everything essential to the public safety, health and morals, and includes "the regulation of railways and other means of public conveyance." Joyce on Franchises thus states the same rule, in § 387:

"A municipality under its right to make resonable regulations concerning the use of its streets by a street railroad company may limit the speed of its cars, or the length of time of service or of running of cars on certain streets."

We believe it to be equally well settled that it was not within the power of the city, in any franchise it may have conferred upon the railway company, to divest itself of its governmental police power, the exercise of which is necessary for the public welfare and the preservation of the public safety. Elliott, Railroads, § 1082; Joyce, Franchises, § 366; Abbott, Municipal Corporations, § 854; *Beer Co. v. Massachusetts*, 97 U. S. 25, 33; *St. Louis & San Francisco R. Co. v. Mathews*, 165 U. S. 1, 23.

"The power is continuing and no grant that can be made legally can destroy it. Therefore, the municipal corporation in granting franchises for the use of streets may not divest itself of the authority of control and regulation. It is true, under our constitutional system, that, neither vested rights can be destroyed, nor the obligation of contracts impaired. But public necessity may, legally, limit or control these fundamental rights, only, however, in the reasonable exercise of the sovereign police power. The police power to regulate comprehends all necessary and convenient regulations designed to protect life or limb, or to promote the comfort of the public in the use of the streets and thoroughfares. Not only does such power exist, but the duty to exercise it is imposed as a solemn obligation upon the municipal authorities." McQuillan, Municipal Ordinances, § 473.

See, also, *Petz v. Detroit*, 95 Mich. 169, 54 N. W. 644.

Maintaining, then, that the city of Tacoma had reserved to itself ample police power to pass Ordinance No. 3,883, the next inquiry naturally is, has the city the power to use this reserved power. The general police power conferred upon municipal corporations by the constitution is found in art 11, § 11:

"Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations are not in conflict with general laws."

The general powers delegated by the state to cities of the first class are enumerated in Rem. & Bal. Code, § 7507, among them:

"9. To authorize or prohibit the locating and construct-

ing of any railroad or street railroad in any street, alley, or public place in such city, and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed; to provide for the alteration, change of grade, or removal thereof; to regulate the moving and operation of railroad and street railroad trains, cars, and locomotives within the corporate limits of said city; and to provide by ordinance for the protection of all persons and property against injury in the use of such railroads or street railroads."

Under subdivision 36 of the same section, is granted the right to provide for the punishment of all practices dangerous to public safety, and to make regulations necessary for the preservation of public health, peace, and good order; and to provide for the punishment of all persons violating any of the ordinances. These provisions of the constitution and statute would seem to be a sufficient conferring of police power upon the municipality by the state. The charter of Tacoma, passed under these general powers, contains, in § 52, subdivision 9, the assertion of its authority "to regulate the moving and operation of railroad and street railroad trains, cars and locomotives within the corporate limits, and to provide for the protection of persons and property against injury in the use of such railroads and street railroads." While, under subdivision 36, it asserts its power to pass penal ordinances, in the language of subdivision 36, *supra*. These constitutional, statutory and charter provisions show a sufficient conferring of power upon the municipality by the state, and the assertion on the part of the municipality to use all such power conferred. The police power being ample, then, to sustain Ordinance No. 3,883, and the exercise of this power having been conferred upon the city, and the city having exercised it as conferred, appellant's second objection, that the ordinance is not justified and cannot be vindicated as a valid exercise of the police power, must also fail.

Appellant, in connection with his second assignment of

error, makes another assertion which we will notice, contending that the ordinance is void because it is oppressive, and arbitrary, in declaring, "every person violating the provisions of this ordinance shall be fined;" and in support of this contention cites *Town of Oxanna v. Allen*, 90 Ala. 468, 8 South. 79; *Townsend v. Circleville*, 78 Ohio St. 122, 84 N. E. 792, 16 L. R. A. (N. S.) 914, and *Ex parte Young*, 209 U. S. 123. A review of those cases will, we think, show they are based upon reasoning which cannot obtain here. In the *Oxanna* case, the superintendent of a street railway company was convicted of a violation of an ordinance providing that it should be unlawful for any street railway company to permit its roadbed or tracks to remain so high above the surface of the street as to discommode and seriously interfere with public travel, and declaring that the president, superintendent, or other officer of such railway company violating the foregoing provision should be fined. Held, that the ordinance was unreasonable and oppressive in so far as it concerned the superintendent, as it made him quasi criminally responsible for the failure of the company to expend money in putting its track in suitable repair; that it was the duty of the company to appropriate money to keep its roadbed in repair. The superintendent had no power to make them, nor could he be expected to use his own money for such purpose. He could not be held responsible for a dereliction of duty on the part of the company. In the case before us, the charge is, failure to maintain a schedule provided for in the ordinance. It was charged in the complaint, admitted in the answer, and the court expressly found, that appellant was "in charge of the running and operation of the street car system of the city of Tacoma;" hence, he was clothed with the power denied the superintendent in the *Oxanna* case, and the reasoning of the court has no application. In fact, it was not attempted to be shown that appellant had no such power. In the *Townsend* case, the ordinance required an interurban railway to stop its cars at all cross streets and

intersections. The conductor of one of the cars was arrested and fined for failing so to stop. Held, no power in the municipality to pass such an ordinance under a power granted "to regulate speed of interurban cars within the corporation," or a second provision providing for the control of the streets. The reasoning of the court is best given in its own language:

"The street railway is what its name signifies, a railway on a street to facilitate its use as a way for persons to pass from one point to another in the city, or through the city; but with the advent of electricity as a motive power the street railway was extended to the suburbs, and as a result of development in its use it has been found practicable to operate cars for long distances, so that now we have the interurban railway, extending from city to city, over the streets and upon or along the highways. . . . If every city and village through which such a railway passes may require its cars to be stopped at every street intersection to take on or to discharge passengers, and to serve the purposes of a street railway, then its usefulness as a means of interurban transportation may be very much limited, because so much time will be consumed in passing through cities and villages that it will no longer be practicable for many to travel that way. Councils may reasonably be expected to be actuated by considerations of local convenience rather than those of the public and in view of the importance of the subject, and its comparatively recent origin, it would seem to be a matter for consideration by the legislature, and it is in view of these considerations that we reach the conclusion that the power has not been conferred by the general terms of section 28."

From the above reasoning it is apparent that the decision on this branch of the case is based upon the character of the railway—an interurban, as distinguished from a local street railway—and the holding of unreasonableness is due to the impracticability of stopping the cars of such a railway at every street crossing in every city. Such reasoning is of no value here. In the *Young* case, the state of Minnesota passed an act fixing two cents a mile as the maximum passenger rate in that state. The act further declared that "any railroad company or any officer, agent, or representa-

tive thereof, who shall violate any provision of this act, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment in the state prison for a period not exceeding five years, or both such fine and imprisonment." It was held that imposing such enormous fines and possible imprisonment rendered the statute unconstitutional on its face, irrespective of the insufficiency of the rates, as persons affected by the law were, because of the enormous penalties for disobedience, prevented from so doing and resorting to the courts to test the validity of the statute, and thereby denied the equal protection of the law. The penalty fixed by the ordinance under review is a fine not exceeding $100. It does not seem to us, therefore, that the reasoning of the courts, nor the grounds upon which the decision in each of these three cases is made, renders them authoritative upon the question before us.

We, therefore, conclude that the judgment of the court below was right upon the law, and the same is affirmed.

CROW and DUNBAR, JJ., concur.

RUDKIN, C. J., and CHADWICK, J. (dissenting)—Before an officer of a street railway company can be held liable criminally for the violation of an ordinance requiring the company to make repairs, maintain schedules, etc., it must affirmatively appear that the company has supplied him with both the means and the authority to comply with the requirements of the local law, otherwise the ordinance is manifestly unreasonable and oppressive. *Town of Oxanna v. Allen*, 90 Ala. 468, 8 South. 79.

We think both the complaint and findings in the case at bar are deficient in this respect, and therefore dissent.

[No. 8858. Department Two. January 4, 1911.]

VICTOR PIERSON *et al.*, *Respondents*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

PARTIES—CAPACITY TO SUE—FILING NAME OF FIRM—WAIVER OF OBJECTION. The provisions of Rem. & Bal. Code, §§ 8369, 8373, providing for the filing of certificates by persons doing business under an assumed name, before maintaining any action or suit, relates only to the capacity to sue, and are waived unless objection is raised by demurrer.

CARRIERS—LIVE STOCK—LIMITED LIABILITY—CONTRACT—VALIDITY—IMPEACHMENT. If freely entered into, a limited liability contract for the shipment of live stock fixing a maximum valuation, on which the transportation rate is based, measures the rights of the shipper for injuries through negligence of the carrier, and the contract is not impeached, as a matter of law, by evidence to the effect that on transferring from one railway to another, the contract was signed hurriedly without reading it, or explanation; especially where the original contract for shipment was of the same character.

SAME—LIMITED LIABILITY—CONSIDERATION—PRESUMPTION. Upon shipping stock under a limited liability contract, it will be presumed, in the absence of evidence to the contrary, that a fair consideration was given in the way of reduced rates.

SAME—LIABILITY—VIOLATION OF FEDERAL STATUTE. A limited liability contract for the shipment of stock prevails in the case of overconfinement of the stock in violation of a Federal statute, as in other cases, where the act was due to negligence.

SAME—ACTIONS—PRECEDENT NOTICE OF CLAIM—REASONABLENESS. A stipulation in a contract for the carriage of live stock providing that written notice of claim for damage shall be given before the stock is removed from the place of destination is unreasonable and inapplicable where the injuries to stock could not be ascertained with any degree of certainty within the time limited, nor where the animals died before their removal.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 7, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action to recover for damages to horses transported. Reversed.

[1]Reported in 112 Pac. 509.

Edward J. Cannon, Arthur B. Lee, George M. Ferris, Charles E. Swan, and *Thomas A. E. Lally,* for appellant.

D. W. Hurn and *C. C. Upton,* for respondents.

RUDKIN, C. J.—On the evening of August 6th, 1906, the plaintiffs, Pierson Brothers, shipped a car load of horses over the Oregon Short Line railroad from Dillon, Montana, to Silver Bow, Montana, a distance of sixty miles. On the arrival of the train at the latter point soon after midnight of the same day, the car containing the horses was transferred from the Oregon Short Line to the road of the defendant company for shipment to Sandpoint, Idaho. Before the train left Silver Bow for Sandpoint, the plaintiff Victor Pierson, who had charge of the horses, entered into the common form of live stock contract with the defendant company, which contained the following stipulations and provisions, among others:

"And it is hereby further agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sums, to wit: Each horse, seventy-five dollars; each mule, seventy-five dollars; each stallion, one-hundred dollars; each jack, one hundred dollars; each ox or steer, fifty dollars; each bull, fifty dollars; each cow, thirty dollars; each calf, ten dollars; each pig, ten dollars; each sheep or goat, three dollars; such valuation being that whereon the rate of compensation to said carrier for its services and risks connected with said property is based. . . . .

"The said shipper further agrees that, as a condition precedent to his right to recover, any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock."

The car arrived at Sandpoint on the afternoon of August 8th, and after their removal from the train eleven head of the horses died, and the remaining eight head were materially injured through the alleged negligence of the defendant in the course of the shipment. The present action was instituted

to recover damages for the loss thus sustained. A more detailed statement of the case will be found in *Pierson v. Northern Pac. R. Co.*, 52 Wash. 595, 100 Pac. 999. From a judgment in favor of the plaintiffs, the railroad company has appealed.

The first assignment of error is based on the denial of a motion for nonsuit, interposed at the close of the respondents' testimony, on the ground that they failed to allege or prove a compliance with chap. 145 of Laws of 1907, page 288 (Rem. & Bal. Code, § 8369 *et seq.*), which provides for the filing of the names of persons doing business under an assumed name and that:

"No person or persons carrying on, conducting or transacting business as aforesaid, or having an interest therein, shall hereafter be entitled to maintain any suit in any of the courts of this state without alleging and proving that such person or persons have filed a certificate as provided for in § 1 hereof, and failure to file such certificate shall be *prima facie* evidence of fraud in securing credit." Rem. & Bal. Code, § 8373.

Waiving the question whether "Pierson Brothers" is an assumed name, and whether the act applies to a copartnership doing business in the state of Idaho, we held in *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031, that § 7 of the act of March 12th, 1907, Laws of 1907, p. 271 (Rem. & Bal. Code, § 3715), which contains a similar provision relating to the commencement and maintenance of suits by corporations, only goes to the capacity to sue, and that the objection is waived unless raised by demurrer or answer. That case is decisive of the question here presented.

The remaining assignments of error are based on the refusal of the court to give effect to the stipulations in the contract of shipment as above set forth.

If this contract was freely and fairly entered into, it measures the rights and obligations of the parties, under repeated rulings of this and other courts. *Hill v. Northern Pac. R. Co.*, 33 Wash. 697, 74 Pac. 1054; *Jensen v. Spokane Falls &*

N. R. Co., 51 Wash. 448, 98 Pac. 1124; *Windmiller v. Northern Pac. R. Co.*, 52 Wash. 613, 101 Pac. 225; *Gomm v. Oregon R. & Nav. Co.*, 52 Wash. 685, 101 Pac. 361; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331.

The testimony offered by the respondents to impeach the contract is, as a matter of law, utterly insufficient for that purpose. The following, given by Victor Pierson, one of the respondents, is the only testimony bearing upon that question:

"Q. Who presented that contract to you for signature, if you know? A. Why, supposed to be the agent, or I thought it was the agent. Q. What did he say to you when he came to you with it? A. Are you the man that owns this car of horses? I said, yes, sir, and then, well, he says, you got to come in here and sign this contract if you want to go, you only have ten minutes, because they are ready to pull out. And I went in and signed the contract. Q. Did you say anything to him when he said that to you? A. I said that I had a contract. Q. What did he say? A. Well, he said you got to sign this contract in order to go, your horses as well as yourself. Q. What did you do then or say? A. I just went in and signed the contract, took one of them. Q. Where did you sign the contract? A. I signed the contract in the office. I went into the office and signed the contract, or two of them rather, and I got one of them and walked right out of the depot and went right to the train. We started right out of the yards, but backed in again. Q. What kind of an office was that? that is, how many rooms did you go into? A. It had one room, just one room. Q. How was that room lighted? A. With one lamp. Q. What, if anything, did this contract lay on when you signed it? A. Laid on the desk, or whatever you might term it, as in front or kind of to one side of the partition, and he says just sign up here. It was quite dark in there on account of the lamp was small and I just signed it, and I was in a hurry to catch the train because the car had already passed. Q. Where was that lamp with reference to where you signed? A. It was right on the desk, the counter. Q. How far from where you signed? A. Just a foot or two. Q. Then you could see to read the contract? A. Not plain; no, sir. Q. What did the agent say to you, if

anything, about when your car was going to leave while you were in there with him signing the contract? A. In ten minutes. Q. Where were you when he told you that? Were you in the office or was that before you went into the office? A. Just as we went into the office. Q. Did he say anything to you at the time you signed that contract about there being more than one rate of freight? A. No, sir. Q. Did he say anything to you at the time as to what rate of freight you would have to pay under that contract? A. No, sir. Q. Was anything said at any time or place about rates? A. No, sir. Q. Was anything said to you in any way about the value of the horses? A. Nothing. Q. Have you told us all that was said between you and the agent as far as you can tell us at the time you signed that contract? A. As far as I can recollect now; it is so long ago that is all I can recollect. Q. Was there anything said about a pass or your having a pass? A. Yes, sir. Q. Who said it to you and when? A. This man that had me sign the contract. Q. What did he say? A. He said this is your pass for yourself and horses. Q. When did he say that? A. When I was in the office. It was before—after I signed the contract. Q. Well, after signing the contract what did you do? A. I went right to the caboose and we pulled right out. Q. How long after you got on the caboose before it pulled out? A. Just a few minutes, not over five minutes. Q. Where did it go then? A. It went out of the yard limits and backed in again. Something wrong with the train, the boys said; that is, the trainmen."

At another point in his testimony the witness testified that he did not read or examine his contract until the horses were dying at Sandpoint, two or three days after its execution. The claim of the witness that he already had a contract for the shipment to Sandpoint is not borne out by the testimony. The Oregon Short Line contract only covered the shipment from Dillon to Silver Bow, and the freight was only paid between these points. It is a significant fact that this was also a limited liability contract, differing in degree but not in kind from the contract now under consideration. Under the first contract the animals were shipped as range horses, and the liability in such cases was limited to not exceeding ten

dollars per head. The fact that the contract was not read or explained to the shipper, or that he was asked no questions, or that the contract was signed hurriedly, cannot be permitted to relieve the respondents from its obligations. Written contracts will prove of little avail if parties can avoid the burdens imposed, by signing in haste and closing their eyes to their contents.

"The shipper cannot evade the limitations imposed by the special contract by showing that he executed it hurriedly or without due care, nor by showing that he was ignorant of the provisions of the contract. If he executes the contract by affixing his signature, or by accepting without objection a receipt containing the limitation, he will be conclusively presumed to have assented to its provisions, no fraud on the part of the carrier appearing." 5 Am. & Eng. Ency. Law (2d ed.), p. 300.

"A contract, *ex vi termini*, implies the assent of two or more minds to the same proposition. It follows, therefore, if one sign a written instrument containing mutual stipulations between himself and another, without any knowledge of its contents, there will not be in fact, in the strict sense of the term, a contract between them, though in a legal sense there may be. Where a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard, deliberately signs a written agreement without informing himself as to the nature of its contents, he will nevertheless be bound, for in such case the law will not permit him to allege, as a matter of defense, his ignorance of that which it was his duty to know, particularly where the means of information are within his immediate reach, and he neglects to avail himself of them. Applying this elementary principle to the case in hand, it was clearly the duty of appellant to have examined the contract in question, and fully advised himself as to its contents, before signing it; and if, by a failure to perform this duty, he has sustained an injury, he must suffer the consequences, unless such failure was occasioned by the fraud or artifice of appellee—and this, we understand, appellant claims was the case." *Black v. Wabash St. Louis & Pac. R. Co.*, 111 Ill. 351, 53 Am. Rep. 628.

"The shipper was not obliged to sign the contract without reading it, and, if he saw fit to do so, he must take the consequences." *Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55.

"It would tend to disturb the force of all contracts, if one, in possession of ordinary capacity and intelligence, were allowed to sign a contract and act under it in the enjoyment of all its advantages, and then to repudiate it upon the ground that its terms were not brought to his attention. In the absence of all fraud, misrepresentation, or mistake, it must be presumed that he read the contract, and assented to its provision." *Bethea v. Northwestern R. Co.*, 26 S. C. 91, 96.

"There being no special parol contract, and there being nothing in the written contract contrary to public policy, plaintiff cannot now assert that the written contract is not binding because he signed it in haste, without reading." *Hengstler v. Flint & P. M. R. Co.*, 125 Mich. 530, 84 N. W. 1067.

See, also, *Nashville etc. R. Co. v. Stone & Haslett*, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. 955; *McMillan v. Michigan etc. R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Arthur v. Texas & Pac. R. Co.*, 139 Fed. 127; *Cau v. Texas & Pac. R. Co.*, 194 U. S. 427.

But this rule is elementary, and sound public policy would not permit of the adoption of any other. We are therefore clearly of opinion that the rights of the parties are measured by the limitations contained in this contract. It is said that no evidence was offered tending to show that the stock was shipped at a reduced rate, but the contract so recites, and there is no evidence to the contrary.

"In the absence of any proof to the contrary, it will be presumed that a fair consideration was given for the special contract in the way of reduced rates of transportation or of special privileges, and such a consideration need not be proved." 5 Am. & Eng. Ency. Law (2d ed.), p. 300.

Again, it is said that the injury was caused by confining the stock in the car for more than twenty-eight hours, in violation of a Federal statute, and that the contract does not

relieve the carrier in such cases. We are not aware that any such distinction exists. This was an act of negligence and nothing more, and in the *Windmiller* case, *supra*, we held that the limited liability would prevail even in a case of theft.

As stated above, the contract contained a further stipulation that, as a condition precedent to the right to recover damages for loss or injury to any of the stock, the shipper would give notice in writing of his claim therefor to some officer or station agent of the company, before the stock was removed from the place of destination or mingled with other stock. This clause of the contract would perhaps be effectual in some cases, but in a case like the present, where the nature and extent of the injuries to the animals surviving could not be ascertained with any degree of certainty within the limited time provided in the contract, the stipulation is unreasonable and inapplicable. *Western R. Co. v. Harwell*, 97 Ala. 341; *Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482; *Gulf, Colorado & S. F. R. Co. v. Stanley*, 89 Tex. 42; *Houston & Texas Cent. R. Co. v. Davis*, 11 Tex. Civ. App. 24; *Ormsby v. Union Pac. R. Co.*, 4 Fed. 170. Nor has it any application to the animals which died before their removal from the place of destination. *Kansas & A. V. R. Co. v. Ayers*, 63 Ark. 331, 38 S. W. 515.

On the entire record we are therefore of opinion that the recovery should have been limited to seventy-five dollars per head, for the animals that died, with legal interest from the date of the commencement of the action, and to such further sum as the jury might award for injuries to the remaining animals. Inasmuch as the record does not disclose the amount allowed by the jury for this latter claim, we are unable to direct a final judgment at this time. The judgment will therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion. It is so ordered.

DUNBAR, CROW, CHADWICK, and MORRIS, JJ., concur.

ON PETITION FOR REHEARING.

[Decided February 8, 1911.]

PER CURIAM.—A petition for a rehearing has been filed by the respondents in this cause, in which it is asserted that, under our former opinion, no recovery can be had for the expenses incurred in good faith in attempting to effect a cure of the injured horses or for the burial of the dead horses. These items of damage were not in issue at the former hearing, nor was a recovery therefor objected to, except on the general ground that no notice of the loss was served on the appellant as required by the terms of the contract of shipment. We are of opinion that a clear right of recovery exists for the expenses thus incurred in good faith, and we did not intend to decide or intimate otherwise on the original hearing. With this explanation the petition for rehearing is denied.

[No. 9303. Department Two. January 4, 1911.]

Z. T. HOLDEN, *Respondent*, v. LIVIA QUAGLITTI ROMANO, *Appellant*.[1]

APPEAL—REVIEW—FINDINGS—PLEADINGS—AMENDMENT. In the absence of a statement of facts, the evidence is presumed to support the findings, and the pleadings will be deemed amended to conform thereto.

APPEAL—REVIEW—FINDINGS. Findings not being essential in equity, judgment will not be reversed for insufficiency of the findings to support the decree, the findings not showing affirmatively that a different judgment should have been entered.

Appeal from a judgment of the superior court for King county, Sheeks, J., entered February 28, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to cancel a deed. Affirmed.

[1]Reported in 112 Pac. 489.

Eugene A. Childe, for appellant.

Edgar S. Hadley, for respondent.

PER CURIAM.—This is an appeal from a decree cancelling a deed obtained through fraud. The case comes here on the judgment roll, without a statement of facts or bill of exceptions, and but two errors are assigned: First, that the findings of fact and conclusions of law are inconsistent with the cause of action set forth in the complaint; and second, that the findings of fact do not support the conclusions of law and decree. We find no merit in either of these assignments. The contention that the action was prosecuted solely on the theory that the deed was obtained from the respondent while intoxicated is not supported by the record. The complaint alleged other fraudulent acts, and alleged the intoxication of the respondent largely by way of inducement. Furthermore, in the absence of a statement of facts we must presume that the testimony supports the findings, and would deem the complaint amended if need be. We are further of opinion that the findings support the decree, but if they do not, that fact of itself affords no ground for reversal. This is an equity case and no findings were necessary. In such cases it is only where the findings are complete in themselves, and show affirmatively that a different judgment should have been rendered, that this court will interfere or reverse the judgment of the trial court. *Clambey v. Copland*, 52 Wash. 580, 100 Pac. 1031, and cases there cited. There is no error in the record, and the judgment is affirmed.

[No. 8780. Department Two. January 4, 1911.]

HUGHES & COMPANY, *Appellant*, v. FRED FLINT *et al.*, *Respondents*.[1]

APPEAL—REVIEW—FINDINGS. Findings will not be reversed on appeal because of conflict in the testimony, or because the greater number of witnesses testified to the contrary.

BILLS AND NOTES—HOLDER IN DUE COURSE—PAYMENTS—APPLICATIONS—MECHANICS' LIENS. Where a check drawn in favor of a building contractor is marked "on contract" and the drawee had notice of the contract and had opened a separate account with the contractor thereon, the drawee on paying the check is not a holder in due course, under Rem. & Bal. Code, § 3443, and cannot apply the payment to other accounts of the contractor.

MECHANICS' LIENS—PAYMENT—APPLICATIONS. A materialman receiving a check from a contractor, with notice that it was payment on the building contract, is bound to apply it on the contractor's account for that building, and cannot divert part of the proceeds to other accounts and claim a lien against the building for the balance.

MECHANICS' LIENS—MATERIALMEN—PAYMENT—TENDER. In an action by a materialman to foreclose a mechanics' lien for a balance due from the contractor, a tender by the contractor "in full payment," which includes all that could be charged as a lien against the property, could have been accepted without prejudice, and accordingly relieves the owner from liability, although the tender was insufficient to discharge all claims against the contractor.

MECHANICS' LIENS—ATTORNEY'S FEES. It is not an abuse of discretion to deny attorney's fees in an action to foreclose a mechanics' lien, where tender was made of all sums that could be charged against the property.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered November 15, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a materialman's lien. Affirmed.

J. D. Campbell and *J. B. Campbell*, for appellant.

Wakefield & Witherspoon, for respondents.

[1]Reported in 112 Pac. 633.

CHADWICK, J.—Appellant, who is a dealer in plumbers' supplies, furnished respondent James Maxwell, a contractor, material and supplies for a building then in course of construction. The building belonged to the respondents Flint, and was known as the Flint job, and was so entered on the books of the appellant, it being the custom of appellant to keep such accounts separate and sell only with reference to the particular job. Maxwell had several accounts unpaid and overdue on the 20th day of September, 1908. On that day a check was drawn by respondent Fred Flint, payable to the order of Maxwell for the sum of $1,500. On the face of the check the words "on contract" were written. This check was endorsed by Maxwell and delivered to appellant, and of the whole sum but $317.67 was credited on the Flint job, the remainder being credited upon, or used to balance, other accounts. Again, on October 23, 1908, another check for the sum of $1,000 was drawn by Flint, payable to the order of Maxwell, and by him endorsed over to appellant. The words "on contract" were also written upon this check. The check was cashed by appellant, and $242.59 was credited upon the Flint job account, the remainder being applied to other and older accounts. Other credits were made upon the account, so that on the 29th day of January, 1909, the books of appellant showed the total debits on the Flint job to be $2,747.79, the total credits to be $1,079.58, leaving a balance due of $1,668.21, to secure which a lien was filed, and in due time this action was begun to foreclose the same.

Respondents, the Flints, answering appellant's complaint, set up the payments hereinbefore alluded to, and further that, on the 13th day of January, 1909, there was due Maxwell, the contractor, a balance of $1,022.80 on his contract, and that at the instance and request of Maxwell, they had caused a check to be drawn for that sum, payable to the order of appellant, which check had been tendered to appellant and refused by it. The trial judge found that the Flints were entitled to have the two first checks drawn by them credited

in full upon the Flint job account, and these, together with the sum of $52.06 for goods returned, being so credited, a balance would remain in favor of appellant in the sum of $195.73. Judgment was rendered against Maxwell for $195.73, and a provisional lien declared against the property of the Flints for a like sum, conditioned upon the payment of that amount into the registry of the court within two days after the rendition of the judgment. No costs or attorney's fees were allowed appellant.

Appellant attacks the findings of the court that Maxwell directed the entry of the checks to the credit of the Flint job account, the theory of appellant being that, in the absence of any specific direction to apply the proceeds of the checks to any particular account, it could, as in other cases, satisfy any account standing in the name of Maxwell. A right to apply payments, under the facts as we have detailed them, is the ultimate issue in this case. It is undoubtedly the rule, as is contended by appellant, that, if no direction is made by a debtor who owes several accounts, the creditor may apply a payment as he sees fit; and if there be no direction or specific application by the creditor, the law will apply it to the oldest account. *Frazer v. Miller*, 7 Wash. 521, 35 Pac. 427; *Kelso v. Russell*, 33 Wash. 474, 74 Pac. 561.

But to bring itself within this rule, appellant assumes that there was no direction on the part of Maxwell. It is true that appellant's witnesses testified, as to one check at least, that Maxwell assented to the application of the payment to any account appellant desired, but this is denied by Maxwell. The finding of the trial judge being thus sustained by competent testimony, we could not overrule it without doing violence to a rule so frequently announced by this court as to need no citation of authority; that is, that the findings of the trial judge, when sitting without a jury, will not be reversed because of a conflict in the testimony, or because the greater number of the witnesses have testified to the contrary. There is a personal equation in all trials which appellate courts can-

not measure, and verdicts and judgments would indeed be insecure should they attempt it. But the facts in this case are such that it clearly falls without the limit of the general rule. Appellant had notice of the Flint contract, and had so entered it on its books. The check drawn by Flint upon which the words "on contract" were written, when presented by the contractor, was sufficient to put appellant upon notice, and it could not, without notice to the owners, divert the payment and charge them with a lien for a like amount. Being so marked, the check was not received in due course. A holder in due course is a holder who has taken an instrument, complete and regular upon its face. Rem. & Bal. Code, § 3443.

Waiving the actual notice which the books of appellant import, the equities of the respondents Flint would still be paramount.

The rule is stated in 7 Cyc. 949:

"As a rule any irregularity, erasure, ambiguous or uncertain clause, or peculiarity connected with the paper, which is sufficient to excite suspicion or demand inquiry of a person exercising ordinary business prudence and judgment, will operate as constructive notice to a purchaser taking the same without inquiry."

In this respect the case falls within the rule of *Bowles Co. v. Clark*, 59 Wash. 336, 109 Pac. 812, where the proceeds of a check, drawn by the owner in favor of the supply house for the estimated cost of plumbing supplies, had been applied as follows: A part to cover the cost of supplies then furnished; a part to balance an older account, and the remainder in money paid to the contractor. The supply house furnished additional materials and filed a lien. It claimed to have received the check in due course. The fact that the check was drawn by a stranger to the supply house was held to be enough to show a property in the check in the drawer. The court there said:

"But we think it too much to say that these circumstances were of such a nature as to warrant the belief that the prop-

erty in the check was the property of Fraser [the contractor.] The check itself contained a distinct warning to the contrary. It was made payable to the respondent [the supply house], a stranger to the drawer, and not to Fraser, and it is not reasonable to suppose that Fraser would have accepted payment of an obligation due himself in a form which he could not use without the consent and co-operation of a third person."

In *Crane Co. v. Pacific Heat & Power Co.*, 36 Wash. 95, 78 Pac. 460, it was held that the answer of a surety, alleging that plaintiff had received and credited money paid on a particular contract, knowing its source, to other accounts, stated a defense; and further that, knowing the source of the payment, the materialman could not apply payments, under the general rule, to the prejudice of a surety on the contractor's bond. In principle that case is like unto this. The right to apply the payments to the older or other accounts was denied, because the lien claimant had notice that the money was paid on the contract which the surety company had underwritten.

The owner of land who lets a contract for the erection of a building upon it is an involuntary debtor, made so by the terms of a statute; and where he has made payment on his contract, and the amount thereof has passed to the materialman having notice of the contract, and the source of the payment, or the payment being made by check bearing words which import an equity in the drawer so as to exempt it from the provisions of the negotiable instruments act, equity and fair dealing demand that the owner should not be made to pay his debt over again. The appellant in this case has lost nothing through the conduct of the respondents Flint, and they are entitled to a just credit for the money paid by them on their contract with Maxwell.

It is now insisted that, if the payments should be credited to the Flint job account, nevertheless appellant should have judgment for the $1,022.80 tendered by Maxwell, because the check was tendered "in full payment" of the Flint job, and for that reason they were not bound to accept it. The Flints

were liable for $195.73, and no more, and as the greater sum included the less, appellants might have accepted the check without prejudice to their rights. The tender did not create a right of action or alter the relations of the parties. Nor could the court have entered, as we are now asked to do, a judgment against Maxwell for a greater sum than was due on the Flint job, that being the subject-matter of the present action, and no issue having been tendered on his personal or general accounts with appellant.

The court denied an attorney's fee, and this too is alleged as error. Under the facts, the trial judge did not abuse his discretion in this respect. Respondents should not be penalized in costs or attorney's fees after tendering all that could be charged against their property.

Judgment affirmed.

RUDKIN, C. J., CROW, MORRIS, and DUNBAR, JJ., concur.

[No. 8875. Department Two. January 4, 1911.]

MRS. J. W. FEIGHAN *et al.*, *Respondents*, v. R. J. REEVES *et al.*, *Appellants*.[1]

ACCOUNTING—TRUSTS—INTEREST. Upon an accounting of a trust running over many years, the trustee should not be charged interest on sums received which were by him applied to the payment of interest-bearing obligations, he having reaped no personal benefit from the trust funds, and the owners of the funds not having sustained the loss of their use; but he is liable for interest on sums received and not accounted for by him.

TRUSTS—TRUSTEE'S COMPENSATION. Upon an accounting of a trust, the trustee being a selling agent of real property, it is proper to allow him compensation only up to the time when he turned over the selling agency to real estate brokers.

ACCOUNTING—PARTIES ENTITLED—TRUSTS. Upon an accounting by a trustee, the trustee is not entitled to an accounting by a predeces-

[1]Reported in 112 Pac. 627.

sor, there having been no privity of contract or relationship between them, and the first trustee having been in charge when there was no profit in the property, and the interests of the second trustee being confined to a share in net profits.

Appeal from a judgment of the superior court for Spokane county, Canfield, J., entered December 23, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for an accounting. Modified.

Danson & Williams and *H. J. Hibschman*, for appellants.

Happy, Winfree & Hindman, for respondents Feighan.

James Z. Moore and *Caleb Jones*, for respondents Moore.

CHADWICK, J.—This suit involves an accounting, the transactions running over a period of approximately twenty-one years. In 1887, J. W. Feighan, James Z. Moore, Aaron Chandler, and J. A. Loomis became the owners in equal right of a Northern Pacific land contract, covering certain lands which they thereafter platted as an addition to the city of Spokane. The sale of the property was put into the hands of Moore as trustee for his co-owners, and he contracted a part of the property and received some payments therefor. In 1892, appellant R. J. Reeves was made attorney in fact for the several owners, and thereafter became the owner in his own right of an undivided one-half of the Loomis interest. Reeves sold lots, received payments therefor, and probably pledged his own personal credit to some extent; and, so far as the record shows, honestly, but after the custom of men, somewhat carelessly, executed his trust. No accounting was ever had between the parties.

The specific finding of the trial judge was: "The defendant R. J. Reeves never at any time rendered an account of his trust, nor was an accounting demanded of him, until the commencement of this action in October, 1907." The greater part of the unsold part of the plat was thereafter lost to the owners through a foreclosure proceeding. The affairs of the

syndicate being somewhat involved, on March 3, 1896, Reeves, for reasons which seemed to him to be for the best interests of all concerned, and in good faith, conveyed all the unsold property to his wife Nina Reeves. This deed was made without consideration, and was held by the trial judge to be absolutely void. The testimony shows, however, and the court found, that the principals were notified of the making of this deed, and the reasons which impelled its execution, and that Reeves thereafter continued in the execution of his trust with the consent of his principals. J. W. Feighan died in 1898, and his widow and heirs brought this suit for an accounting. Chandler disclaimed all interest in the controversy. The heirs of Loomis, who is also deceased, were not made parties; and James Z. Moore, answering, joins in the plaintiffs' prayer for an accounting. Appellant Reeves answering, sets up what purports to be an accounting, asks an affirmative judgment for several thousand dollars, and further demands an accounting on the part of defendant Moore. Further detail of the facts, other than reference to certain figures which we shall presently make, would serve no useful purpose, as this litigation can be of no interest to any one other than the parties immediately concerned. It involves no debatable propositions of law. A valuable memorandum of opinion of the trial judge is made a part of the transcript. A very earnest and persevering effort has been made by him to approximate the true account existing between the parties, and so far as it is possible to arrive at the truth, we think he has done so. The court found that Reeves was entitled to credits as follows:

Cash expended for the benefit of the estate.....	$8,778.28
Compensation, seventy-two and one-half months, at $20.....	1,450.00
Commissions paid McCrea & Merryweather.....	747.50
Traveling and hotel expenses.....	521.15
	$11,496.93

And that he should be charged for property sold by him.....$10,908.00
To which the trial judge added an arbitrary interest charge on all sums received from the date of the receipt up to the commencement of this action, a total of..... 1,675.15

$12,583.15

Leaving a balance due from Reeves to the syndicate of $1,086.22. Of this sum he decreed one-fourth to plaintiffs and one-fourth to Moore.

The court denied Reeves all credits on account of interest. We understand the rule to be that, in matters of accounting, the allowance of interest is largely a matter of discretion with the trial judge. Now, in this case, while appellant claims to have made some advances out of his own funds, no vouchers were produced to show that he did so, nor was it shown to the satisfaction of the court that the items of indebtedness incurred on behalf of the syndicate were not finally paid out of the syndicate funds. But we think, in the absence of any showing of wilful disobedience by defendant Reeves, or that he reaped any personal benefit from the trust funds, but with a showing, on the contrary, that he seems to have devoted them to the payment of the obligations of the syndicate, that he should not be penalized by taxing the interest on all sums received from the date of their receipt up to the time this action was commenced. The theory upon which interest is allowed is to compensate the owners of the funds for the loss of their use, but they have not been so lost in this case. They were, so far as we are able to see, applied to the payment of interest-bearing obligations, and in equity were accounted for when paid out for the benefit of the *cestuis que trust*. As viewed generally, the owners of the fund have lost nothing, but rather gained, by the payment of their obligations, aggregating $8,778,28. However, there is testimony tending to show that Reeves takes account only of the

stated purchase price upon payments made to him, disregarding the accrued interest on contracts. In justice to him, it is proper to say that he has endeavored to cover these items by charging himself with interest at six per cent on all sums received, and taking credit for like interest on all sums paid out. This premise is false, but he is, notwithstanding, chargeable with the interest collected on contracts and unaccounted for. This must be fixed arbitrarily, and we think if he is charged enough to balance the total credits allowed him, substantial justice will be done. The account will then stand:

Dr.	For property sold	$10,908.00
	Arbitrary charge for interest	588.93
Cr.	As itemized above	$11,496.93

The court allowed appellant compensation at the rate of $20 per month from the time he took over the business of the syndicate up to the time of the death of Col. Feighan, upon the theory that his agency was terminated by that event. While we cannot agree with the theory of the trial judge in this instance, for there are facts which take the case out of that rule, we can nevertheless approve his finding upon the theory that, a short time before the death of Col. Feighan, appellant had turned over the selling agency (he was no more than a selling agent) to McCrea & Merryweather, a real estate firm in Spokane, who took entire charge of the property, sold lots, collected the purchase price, and paid the taxes. For this appellant was allowed the commissions charged by McCrea & Merryweather, and to allow remuneration beyond that would make a double compensation, which was not within the contemplation of the parties and would not be tolerable in law.

In one respect, however, the decree of the court does not follow the findings. After fixing the title to certain property in plaintiffs, the court found that Reeves and the heirs of Loomis were each the owners of an undivided one-sixth of the unsold residue of the property. No account is taken of this

finding in the conclusions of law or the decree. A supplemental decree may be entered upon the remand of this case, declaring the appellants to be the owners in their own right of an undivided one-sixth interest in and to the unsold lots in West Grove addition as described in paragraph 2 of the decree heretofore entered.

It is strongly insisted that the court should have required an accounting from defendant Moore. Reeves' interest in the property was acquired long after Moore had surrendered his trusteeship. The court found that there was no privity of contract or relationship between Reeves and Moore, and that there was no profit in the property prior to the year 1892. Up to that time Reeves' only interest was one-half of the net profits of the Loomis interest.

We have gone carefully over the pleadings and testimony in this case. It is likely that the findings of the trial judge have not established the exact truth between the parties. The truth can only be approximated where, as in this case, the transactions run over a period of more than twenty years and through a time when the property was practically valueless, and those most concerned took but little if any interest in it. If the one party was careless in accounting, the others were slothful in demanding an accounting. There is no evidence of an attempt on the part of any one of the parties concerned to take a dishonest advantage of any other. That appellant thought the balance, if ever struck, would be in his favor, we may well believe, and that respondents for a long time were willing to abandon their interest, we may well surmise. So that, barring the penalty put upon appellant Reeves, which is a conclusion of law rather than of fact, we approve and confirm in all things the calculations and findings of the trial judge.

Remanded for modification of the decree as hereinbefore indicated.

RUDKIN, C. J., DUNBAR, CROW, and MORRIS, JJ., concur.

[No. 9020. Department Two. January 4, 1911.]

JAMES BLACK MASONRY & CONTRACTING COMPANY, *Respondent*, v. NATIONAL SURETY COMPANY, *Appellant*.[1]

PRINCIPAL AND SURETY—INDEMNITY—COMPENSATED SURETY—RELEASE—CHANGE IN CONTRACT—PREJUDICE. A compensated indemnity company which gave a bond to secure the performance of a subcontract to furnish stone for a building, is prejudiced by being deprived of its security and by relieving the principal in the bond of the inducement to perform his contract, and there is a substantial breach of the contract discharging the surety from liability, where the contract provided for payment to the contractor only when the stone had been placed in the building, and then upon certificate of the architect; and without notice to the surety the contract was changed and payments aggregating $3,500 were made upon a $16,500 contract before they became due and without any architect's certificate; and but for a delay of sixty days by the principal contractor, the principal in the bond could have completed the subcontract for the stone (DUNBAR and CROW, JJ., dissenting).

PRINCIPAL AND SURETY—INDEMNITY—CONTRACT—CONSTRUCTION. While a rule of strict construction applies to sureties and guarantors, a contract of indemnity is subject to the same construction as any other contract in order to ascertain and give effect to the intent of the parties.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 29, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

Roberts, Battle, Hulbert & Tennant, for appellant.

Arthur E. Griffin, for respondent.

CHADWICK, J.—Respondent took a contract for the erection of the Leary Building, in the city of Seattle. He let a subcontract to the Ellis Granite Company, to cut and place all the stone in the first two stories of the building. It was agreed that the entire work should be finished within one

[1]Reported in 112 Pac. 517.

hundred and twenty-five days from the date of the contract, which was December 12, 1908. The work was delayed, through no fault of the Ellis company, for about sixty days, but was finally finished without any changes or alterations material to this inquiry. The contract price was $16,500, to be paid as follows:

"On the 1st day of each month the contractor shall render to the general contractor an itemized statement of the work placed in the building during the preceding month, which statement shall be verified by the architects, and upon the certificate of the architects there shall immediately be paid to the contractor by the general contractor, eighty-five (85) per cent of the amount of work finished. On the final completion of the work and the acceptance thereof by the architects, as evidenced by their certificate, the remainder of the contract price, together with the percentage retained shall be immediately payable."

The contract provided that, "the contractor shall furnish a bond in the amount of $5,000, for the proper performance of the terms of this agreement." Appellant furnished this bond, which by its terms provided that the contract should be a part of its contract of indemnity. The bond contained the usual provisions with reference to notice to the surety of any material alterations or changes in the contract.

On February 3, 1909, the Ellis company gave notice that it was ready to begin the work of installing the stone, but owing to some delay on the part of the general contractors, it was not permitted to begin work of placing the stone at the time provided in the contract. This delay continued for sixty days. The Ellis company, having no other immediate source of income, was unable to meet its payrolls, and accordingly called upon respondent to make some advances. Respondent, in conjunction with and by the direction of the Leary company, and having satisfied itself that a considerable quantity of the stone—about $7,000 worth—had been cut and was in the yards of the Ellis company, ready for delivery, did make the following advances: February 11, 1909, $500;

February 17, 1909, $2,000; March 6, 1909, $1,000. It being apparent to respondent and the Leary company that additional advances would have to be made, their respective superintendents went to the local agent of the appellant, and asked him to approve in writing of the payments already made and give his endorsement to the payment of such additional sums as were necessary to meet the expense account of the Ellis company. This request was referred by the agent of appellant to its attorneys, and on the next day respondent and the Leary company were informed that appellant conceived the contract to have been broken, and that it was no longer liable on its bond, and accordingly refused to approve the payments that had been made or to give its endorsement to the additional payments required.

On March 26, respondent notified the Ellis company to forthwith proceed with the erection of the granite for the Leary building, "under and pursuant to your contract dated December 12, 1908," and on March 30, 1909, respondent notified the appellant that the Ellis company had "defaulted in the performance of its contract and has refused to proceed therewith, and further that the wages of the employees of said company for the week ending March 20, 1909, were due and had not been paid, and no work has been done under said contract since that date." This notice was of date May 25, and repudiated by appellant, on the theory that, by the advancements referred to and other advancements made thereafter, it was no longer liable, and refused to recognize any further liability on the bond.

The court found that, when the Ellis company made default in payment of its workmen and failed to proceed with the work of installing the stone in the building, it was impossible for the respondent to procure the stone elsewhere without great delay which would have been disastrous to respondent and subjected it to great loss. At or about March 26, and prior to the notice given by the respondent to the appellant that the Ellis company had abandoned its contract, its presi-

dent and secretary went to respondent and to the Leary company and told them that the Ellis company would not be able to carry out its contract, that it was without funds, and that the party who had been financing it had refused to make any further advances, and thereupon offered to respondent and to the Leary company the material in its yards, and the use of its yards and appliances, in the event that they desired to perform the work upon their own account. Whereupon the Ellis company discharged its bookkeeper, took out its telephone, and from that time on did nothing in the way of performance of its contract. The Leary company and respondent put their own man in charge of the yard as timekeeper and bookkeeper, and employed the president of the Ellis company as superintendent at a salary of $50 a week, and at each week end the Leary company drew a check to cover the pay rolls and necessary expenses. This check was drawn in favor of Mr. Sayre, the superintendent, and by him converted into cash which was paid over to the laborers. It does not appear in evidence that anything was paid by the Leary company or the respondent over and above the actual cost of labor and material, unless it be some charges for the timekeeper, telephone, and other items which might be deducted without affecting the real question before us. The trial court found:

"That the defendant National Surety Company was not prejudiced, injured or damaged in any way or to any extent whatsoever either by the first three payments made February 11, 1909, February 17, 1909, or March 6, 1909, aggregating $3,500, and that said defendant was not prejudiced, injured or damaged in any way whatsoever by the subsequent payments made by the plaintiff to the defendant Ellis Granite Company to secure the completion of the contract of said Ellis Granite Company."

The court concluded:

"That the plaintiff is entitled to a judgment against the defendant National Surety Company for the full sum of $5,000, together with interest thereon at the rate of six per cent per annum from the 24th day of November, 1909."

Appellant relies upon five propositions to sustain its appeal:

"First—The advancement of $3,500 before any work whatever was done.

"Second—Payment of $6,632.46 before any material was delivered upon the grounds.

"Third—Payment of $9,571.19 before any payment was due.

"Fourth—Advancements and payments at all times over and beyond the 85 per cent.

"Fifth—Making final payment without notice and without holding back reserve fund as stipulated."

The contentions of respondent are sufficiently indicated by the statement of the facts and the findings which we have quoted or summarized.

This court has held, and it is a doctrine from which we are not inclined to depart, that a compensated surety will not be relieved of his obligation unless it be shown that he has been in fact prejudiced by a breach of the contract; that is to say, the breach must not have been technical but substantial, working a pecuniary disadvantage to the surety, or depriving him of some protection or privilege reserved in the bond. *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052; *Cowles v. United States Fidelity & Guaranty Co.*, 32 Wash. 120, 72 Pac. 1032, 98 Am. St. 838; *Title Guaranty & Trust Co. v. Murphy*, 52 Wash. 190, 100 Pac. 315; *Denny v. Spurr*, 38 Wash. 347, 80 Pac. 541; *Heffernan v. United States Fidelity & Casualty Co.*, 37 Wash. 477, 79 Pac. 1095; *Monro v. National Surety Co.*, 47 Wash. 488, 92 Pac. 280; *Leghorn v. Nydell*, 39 Wash. 17, 80 Pac. 833.

Respondent relies principally upon *Leghorn v. Nydell*, and *Monro v. National Surety Co.*, *supra*. These were cases holding that payments advanced to a contractor before the time stipulated in the contract would not exonerate the bond, in the absence of a positive showing of prejudice. In each of these cases, as in others of a like nature, there was a substantial compliance with the terms of the contract by the contractor. The payment was made in accordance with the

terms of the bond, and having thereafter become due by reason of a performance of the contract, it was held that the objection was technical, and the surety was held to its obligation. As was said in *Cowles v. United States Fidelity & Guaranty Co., supra*, the bond is subject to the contract, and was made after the contract. It is the contract instead of the bond which is primarily to be construed. And, as there suggested, the inquiry should be whether another or a new contract has been substituted for the old one. We think that in this case there was not only a substantial departure, but a clear abandonment of the original contract, and a new contract whereby respondent and the Leary company undertook to do the work upon their own account and for their own benefit. The contract provided that payment should only be made when the stone had been placed in the building, and then upon the certificate of the architect; but without notice to the surety, payments aggregating $3,500 were made upon a $16,500 contract, before they became due and without any certification on the part of the architect.

There is evidence to the effect that, but for the delay occasioned by the Leary Construction Company, amounting to nearly sixty days, the Ellis company could have performed its contract. It was because of the act of the Leary company then, rather than because of the fault of the Ellis company, that it was put in default and compelled to abandon its work. The work being taken over by the respondent and the Leary company, the situation made by them cannot be evaded by showing that accounts were kept with the Ellis Granite Company; that Sayre had been and was in name still its president, and like circumstances. Facts and legal conclusions cannot be overcome by mere bookkeeping. The whole record shows that the Ellis company never performed, nor attempted to perform, any part of its contract, and that the $3,500 or any part thereof never became due it, as was so in the cases relied upon by respondent. No obligee should assume to pay a substantial part of the contract price—as counsel for re-

spondent contend and as it seems probable, a sum equal to or greater than the profit on the job—without notice to the surety. Advances or over-payments are allowed and held to be without prejudice where, under the facts of the particular case, they afterwards become due to the party to whom they have been paid. But here, not only was the time and manner of the payment changed, but more than one-half of the contract price was paid before it was due under the contract. It was never paid under the contract or to the contracting party. It was paid for the actual cost of material and labor, to those who had furnished these items for the benefit of the respondent. The general rule is, if the building owner advances to the builder more than he is entitled to under the contract, the surety will be released. The rule rests upon two reasons. The one is that such advance deprives the surety of the security which the owner or principal contractor has agreed to hold for his benefit, and the loss of the inducement which otherwise would have operated on the contractor's mind to induce him to finish the work in accordance with the terms of his obligation. Hudson, Building & Engineering Contracts, 694; Pringrey, Suretyship & Guaranty, §§ 103, 138; 27 Am. & Eng. Ency. Law (2d ed.), p. 496; *Peters v. Mackay*, 20 Wash. 172, 54 Pac. 1122; *Calvert v. London Dock Co.*, 2 Keen 638; *Wehrung v. Denham*, 42 Ore. 386, 71 Pac. 133; *Glenn County v. Jones*, 146 Cal. 518, 80 Pac. 695; *Leiendecker v. Aetna Indemnity Co.*, 52 Wash. 609, 101 Pac. 219.

The case of *Glenn County v. Jones*, *supra*, is directly in point. Upon a $5,580 contract, $1,860 was paid prematurely, without the consent of the sureties, although $1,900 worth of the material had been put on the ground. The motive was, as in this case, to help the contractor along with his work, and, as here, the board satisfied itself that enough material was on the ground to cover the payment. The court said:

"In our opinion the obligation of the principal was altered

in a material respect without the consent of the sureties. The contractor was under the obligation of placing all the materials on the building-site before he was entitled to any money under the terms of his contract. By the payment to him before he had done so, he secured the money before performing his obligation. The pressure which would have been exerted upon him to continue in the performance of his contract and place all the materials on the site, was removed when he received the money. He received it before he was entitled to it, without the consent of the sureties. The sureties had bound themselves upon the assumption that the plaintiff would keep its contract in good faith. We can see no difference in principle if the whole of the contract price had been paid before any of the materials were placed on the ground. In such case could any one doubt that the sureties would have been exonerated? The risk of guaranteeing the construction of a building to be paid for when completed and accepted, is quite different from the risk of guaranteeing its construction, if the whole contract price should be paid in advance. In the one case the contractor can only get the money by performing his contract, while in the other he would only pay out the money already received, in performing it. In this case the sureties agreed and guaranteed that Jones would place all the materials on the building-site, on condition that he was to receive no money until he had done so; they did not agree that if paid in advance he would place such materials on the site. By the payment, the hope of reward for further performance was lost, the temptation to act dishonestly was increased."

Counsel for respondent seeks to distinguish this case, because the contractor pocketed the money and then abandoned the contract. But the legal principle involved rests, not upon the fact that the contractor took the money and appropriated it to his own use, but upon a breach of the contract by the obligee. Where the money went is immaterial to the surety. If the owner could pay a part when nothing was due, and recover when nothing ever became due under the contract to the principal of the bond, he could then pay all, and upon abandonment hold the surety upon the plea of good motive, and that the payment was made for the benefit of the

obligor. In all the cases decided by this court, and by all other courts holding that payment by the owner would not discharge the principal, the facts have been such that no prejudice resulted by reason of such payments to the surety. But in this case the surety was prejudiced, in the two essentials noticed and endorsed as sufficient by all the books; that is, that they were deprived of that security which their contract gave them; and furthermore, the contractor was relieved of the inducement to perform the labor and furnish the material stipulated in his contract.

The case most relied upon by respondent is *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669. There the contract was "to furnish, cut, set and clean," all the granite work for a building; and provided for payments in installments not to exceed a certain per cent "of the estimated value of the work performed on the building." It was properly decided that the contract should not turn on the words "on the building," so as to render payments made on the estimates of the work done elsewhere a departure available as a defense to the surety, it being evident from the situation of the parties, the nature of the work, and other provisions of the contract, that the intention was to make the payments as the work progressed. In so holding, however, the court expressly affirmed the rule as we have announced it and as that court had previously declared it to be. The object of the courts should be to ascertain and enforce the contract as made, and not to hold the surety to a condition not within the fair contemplation of the parties. Here the contract was to pay for the work placed "in the building" during the preceding month. We have held that compensated sureties would not be heard to invoke the rule of *strictissima juris*, but our holdings have gone no further than to hold that such sureties could not claim the same rule of strict construction available to non-compensated or voluntary sureties or guarantors. When the contract is plain and unambiguous, or when its doubtful terms have been reconciled, whether by the one rule or the

other, this court has, like all others, held the parties to their contract; for as is said in the books, "a surety is bound by the contract he made, and not by some contract which he did not make, even though the latter may be more favorable to him than the former." Sureties and guarantors are not to be made liable beyond the express terms of their contract. The only question open in such cases is to determine what the contract is and enforce it.

"It is unquestionably the well settled rule of law that a surety is entitled to a somewhat rigid construction of his contract; but before this rule is applied, his contract is subject to the same construction as any other contract, in order to ascertain and give effect to the intent of the parties, and it is not until this is ascertained that its language is to be regarded as *strictissimi juris*." Pingrey, Suretyship & Guaranty, § 67;

citing *Belloni v. Freeborn*, 63 N. Y. 383; *People v. Backus*, 117 N. Y. 196, 22 N. E. 759; *Locke v. McVean*, 33 Mich. 473; *Shreffler v. Nadelhoffer*, 133 Ill. 536, 25 N. E. 630, 23 Am. St. 626.

The rule is stated in the last case as follows:

"The rule of strict construction, as applied to the contracts of sureties and guarantors, in no way interferes with the use of the ordinary tests by which the actual meaning and intention of contracting parties are ordinarily determined, but merely limits their liability strictly to the terms of their contract when those terms are ascertained, and forbids any extension of such liability by implication beyond the strict letter of those terms."

Here the contract is plain. It was agreed that no payment should be made until the first day of the month following the installation of the stone. The conduct of respondent and the Leary company shows that they so understood it. The payment of $3,500 was made in defiance of the terms of the contract and, under the authorities cited, operates to the legal prejudice of appellant. That this court has never held that the obligee of a bond was not bound to observe the terms of his contract, or that the surety was bound in any event, it is

only necessary to refer to the case of *Leiendecker v. Aetna Indemnity Co.*, *supra*, which is in line with an unbroken current of authority flowing from the leading case of *Calvert v. London Dock Co.*, *supra*, and all holding that, when ascertained, the stipulations of the contract were binding on both parties. In the *Leiendecker* case, after setting out the specification that the last payment should be reserved for the protection of the surety, Judge Dunbar said:

"There was a contractual relation existing by reason of this bond between the indemnity company and the appellant. This provision was accepted by the appellant when he accepted the bond as a specification of his duties in the premises; and it seems to us that it was a fraud upon the indemnity company to neglect to notify it that a payment had been made which was not disclosed in the contract upon which the bond was given, and the making of which rendered unavailing the provision in the bond just quoted. Having accepted the bond with a provision of this kind, we think the appellant is bound by such provision."

Judgment reversed, with instructions to the lower court to enter a decree in favor of appellant.

RUDKIN, C. J., and MORRIS, J., concur.

DUNBAR, J. (dissenting)—I dissent. The whole record convinces me that the court was justified in finding that the surety company was not prejudiced to any extent, or in any way, by the payments made, and this under our uniform holdings is the test of whether the deviation is material. In the *Leiendecker* case, cited above, it was apparent that the payments out of order were made to the detriment of the surety company. So that the case is in no wise in point.

CROW, J., concurs with DUNBAR, J.

[No. 8631. Department Two. January 5, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. JOSEPH FLANNEY, *Appellant*.[1]

HOMICIDE—DEFENSE—INSANITY—EVIDENCE—ADMISSIBILITY. Upon the defense of insanity to a charge of murder of accused's wife, after a foundation is laid by some evidence of mental aberration, it is error to exclude evidence that the wife, an Indian, had joined the Shakers, a religious organization practicing promiscuous illicit intercourse, whereby the accused was so greatly distressed in mind that his reason was dethroned; since he was entitled to the benefit of any competent evidence tending to account for or naturally lead up to insanity; and the delusion of marital infidelity is a recognized symptom of homicidal insanity.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered April 11, 1908, upon a conviction of murder in the second degree. Reversed.

William M. Thompson and *Henry J. Snively*, for appellant.

J. Lennox Ward, for respondent.

CHADWICK, J.—To sustain this appeal appellant submits three assignments of error, but one of which can be considered by us, owing to the incomplete state of the record. Appellant was charged with the crime of murder, and convicted of murder in the second degree. His defense was insanity at the time of the killing. His victim was his wife, for whom it is asserted he possessed a real affection and with whom he had lived happily for many years. Some time before the killing, his wife had left him and had sought a divorce on the grounds of cruelty, it being shown that, although industrious when sober, like most men of mixed blood—he being a half-breed Indian—his conduct was coarse and cruel when under the influence of liquor. The theory of the defense was that he was insanely jealous of his wife, and believed or cherished the delusion, whatever the fact may be, that his

[1]Reported in 112 Pac. 630.

wife was unfaithful to him; that nevertheless he constantly importuned her to return to him and to her children, a mission he was about at the time of the killing. When she finally refused to leave her then associates and return to her home and to her children, he shot her dead, and in attempting suicide, so wounded himself that he lay unconscious for nearly twenty-four hours. It is unnecessary to go over the positive circumstances relied on to show appellant's mental irresponsibility at the time of the killing. They are not pertinent to our present inquiry, except to say that they furnished, in a degree to be determined by the jury, a foundation for certain evidence which we find was erroneously excluded by the court.

Appellant called a witness by whom he attempted to prove that the wife of appellant had taken up with what is known among the Indians as the Shakers; that the man of whom appellant was jealous, and whom he charged with having weaned his wife away, was a Shaker; that the Shaker Society is an Indian religious organization, which teaches and practices promiscuous, illicit intercourse among its members, and that it is the duty of a member having a spouse who is not one of that faith to secure a divorce; that appellant knew of his wife's faith and, suspecting her of lewd conduct, was so greatly distressed in mind that for the time his reason was dethroned. The offer to prove these things was rejected by the court. We regret that the state has not seen fit to file a brief, for we deem the question presented to be one of more than usual interest and importance. We have made an earnest research of the authorities, and find that it is a first principle of the law that, in all cases involving mental responsibility, whether it be in regard to contracts, wills, etc., or crimes, every fact which tends to show that the mental condition of the subject was abnormal, at the time of the execution of the instrument or commission of the crime, is competent. Underhill, Criminal Evidence, § 159. For the mind diseased cannot be measured by the mind of another. Neither the moving cause nor the limit of its aberration is to be calculated

by any standard fixed by the law or medical science. Each case fixes its own relation to the law. What may unbalance one mind and lead it to act upon its criminal impulses may have no bearing whatever upon another. Therefore it is important that all things which may bear upon the subject of inquiry should be submitted to the jury, that it may say whether, from all the facts and circumstances leading up to the act complained of, the accused was in fact capable of distinguishing right from wrong when he committed the act.

The leading case upon this subject, and the one most relied on by appellant, is that of *People v. Wood*, 126 N. Y. 249, 27 N. E. 362. There the court said:

"There was evidence tending to show that defendant was exceedingly fond of his wife, who was a young woman twenty-two or twenty-three years of age. The defendant was a man about thirty-five years of age, and was also a small farmer or laboring man. Both the deceased and defendant belonged to a very uneducated, illiterate and ignorant class, neither having acquired much property, and both spending a portion of their time in hunting and fishing."

In that case counsel for the defendant offered to prove that, a short time before the day of the homicide, she had told the defendant that her father had stolen his (defendant's) potatoes some three years before. This was offered for the purpose of showing the effect it had on defendant's mind in connection with other matters, but was rejected as incompetent and immaterial; as was also the offer to prove that, in another conversation held the week preceding the homicide, she had given the defendant some information as to certain acts which her father had committed upon her person. In passing upon these questions, the trial judge said:

"It is an issue that does not belong to the case here, and would not be of any value under the circumstances in this case and ought not to be, if it were admitted. The defendant is at liberty to furnish any evidence that he is able to on the subject of the mental condition of this man. That is the defense, and I do not propose if it is possible to avoid it, to

undertake to try the dead man instead of the defendant who is on trial here."

In delivering the opinion of the appellate court, Justice Peckham, afterwards justice of the supreme court of the United States, said:

"The defense is not confined to proof of the condition of the mind of defendant at the moment when he struck the blow or fired the shot. Any material fact which might account for or naturally lead to insanity at that moment may be proved. Why should not the defendant have the right to prove a moral cause which might act upon a brain already diseased and might result in insanity as naturally as blows upon the head? This in connection with evidence tending to show insanity at the time of the act done, is proper. I do not say that proof of these facts, any or all of them, is proof of insanity. That is for the jury to decide. But it is competent for the reason that all the facts are material for the purpose of enabling the jury to say what was the condition of mind of defendant when the deed was perpetrated. The defense is entitled to prove more than the fact that after a certain time when something was told defendant he exhibited certain changes of deportment or appearance. He is entitled to have the jury see that there was a cause sufficient to account for and to create such alteration in conduct and appearance. It greatly tends to strengthen the proof of such alteration. It is admissible for the same reason that evidence is competent to show that the party had a fall on his head, or had been a sufferer for years from some kind of physical ailment which had naturally a depressing influence on the mind."

This case establishes the principle that "a party is entitled to the benefit of any competent evidence he may offer which bears upon a controverted question of fact embraced in the issue." *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066; *People v. Strait*, 154 N. Y. 165, 47 N. E. 1090. The *Wood* case is noted by Clevenger in his work on Medical Jurisprudence of Insanity, page 509, and upon its authority he says:

"The defendant who interposes insanity as a defense may

prove not only irrational and insane acts and conduct, but also facts which may account for such acts and show an adequate cause for the insane conduct, and . . . [p. 519] as tending to show what effect the communication had upon his mind at the time of the commission of the act, . . ."

The case is also quoted as authoritative by Wharton & Stille, Medical Jurisprudence, § § 326, 327, 328. Mr. Wigmore, whose research of the authorities upon this question has been particularly comprehensive, has no doubt of the rule, saying:

"As human conditions of every sort are created or influenced by external environment, so too that diseased mental condition which we term insanity may be precipitated, intensified, or otherwise affected by external events coming to the apprehension of the person. Accordingly, circumstances calculated to induce this mental condition may always be admitted to evidence the probability of such affection; the only limitation is that the circumstance be in itself capable in some degree of producing such an effect, that it came to the person's knowledge, and that some further foundation for probability be laid by other evidence that there was a diseased mental condition." Wigmore, Evidence, § 231.

See, also, Underhill, Criminal Evidence, § 159; 7 Ency. Ev., 449; *Bolling v. State*, 54 Ark. 588, 16 S. W. 658; *State v. McGowan*, 36 Mont. 422, 93 Pac. 552; *State v. Porter*, 213 Mo. 43, 111 S. W. 529, 127 Am. St. 589.

In the *McGowan* case, the defendant was charged with the murder of one whom he suspected of having maintained illicit relations with his wife. The state offered a contract of separation, which had been executed by the parties, upon the theory that it would show that the parties had voluntarily severed any tie of affection that might have theretofore existed between them. The contract was admitted over the objection of the defendant. Upon appeal the testimony was held to be competent. The opinion reads:

"In overruling defendant's objection to this paper, the court said: 'I think I will let it go to the jury. It shows that they were living under this contract of separation. That

might throw some light upon the question to the jury whether or not the defendant was sane or insane. I think, taken with all the other evidence, it is perhaps competent.' It is now contended that the remark of the court, in characterizing the document as a contract of separation, was prejudicial to the defendant. The paper was also objected to as incompetent rebuttal evidence, but we see no force in the objection. The issue being tried was whether the defendant had been rendered insane by the assault of the deceased upon the sanctity of his domestic relations. It was certainly competent to inquire as to how intimate and sacred those relations were in fact, as bearing upon the liability or probability of defendant's becoming crazed by their destruction; . . ."

A delusion of marital infidelity is acknowledged as a type or symptom of homicidal insanity by alienists. Mr. Clevenger, at pages 650, 651, 653, 658, and 1074, cites instances to confirm this theory. So that, whether the accused had a belief grounded in fact or born of imagination, the evidence which was rejected was proper as tending to throw light upon defendant's mental attitude toward the victim of his deliberate physical act. Under all authority, it seems clear that, having laid a foundation by showing some evidence of mental aberration, appellant could show that his wife's conduct had been such as to account for the state of his mind; and that his plea was not feigned. The testimony does not prove or disprove the crime, but it is a circumstance to be considered by the jury, as a blow on the head, or a drug habit, etc. Nor does it introduce a collateral issue to be tried out. The inquiry should not go beyond such limit as will disclose the fact to the jury that there was a cause which might have moved the mind of the accused, and which they may consider as evidence tending to sustain his plea. Such testimony should go to the jury under careful instructions. Its purpose and the limit of its application should be carefully guarded; so that the jury will not take it, if true, as in itself a justification or as an excuse for the crime, nor to prove justification for anger, hatred, revenge, or an uncontrolled passion, or the momentary

impulse of a sane mind; but for just what it is intended—that is, whether, considering all the facts and circumstances offered to show an insane act, it tends to strengthen the testimony by showing an adequate cause accounting in some degree for the alleged mental condition of the accused at the time the murder was committed.

This case, like all which involve the tragedies of domestic life, is a sad one. We may assume that no man can measure the torment which a doubting husband tells o'er. If in the telling his reason so far fails that he cannot distinguish the right or wrong of his act, he is indeed an object of pity and compassion; but on the other hand if, with mental power to distinguish right from wrong, he takes the life of his victim, he should be made to feel the heavy and unflinching hand of the law. It is for the jury to say whether appellant is a felon, or the victim of an unfathomed nature. That it may make no mistake, the appellant is entitled to submit such evidence as he may, providing only that it is relevant and competent to sustain his plea.

The judgment of the lower court is reversed, and the cause is remanded for a new trial.

RUDKIN, C. J., DUNBAR, CROW, and MORRIS, JJ., concur.

[No. 8886. Department Two. January 5, 1911.]

GEORGE WALKER *et al.*, *Respondents*, v. ROBERT McMURCHIE, Trustee, *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER—CONTRACT—NONPAYMENT—FORFEITURE—WAIVER. Where a vendor lived near the land and knew of improvements being made, and took no steps to obtain any payment of principal or interest upon the contract for over three years, equity will not enforce the right of forfeiture until demand is made for payment or reasonable notice is given; and there is no such notice, either by demand for interest, or by notice of forfeiture given to the original vendee, after knowledge that he had assigned the contract to a company, then in possession and managed by another, to whom waiver of forfeiture had been given.

Appeal from an order of the superior court for Snohomish county, Steiner, J., entered December 20, 1909, granting plaintiffs a new trial, in an action on contract. Reversed.

Cooley & Horan and *Robert McMurchie*, for appellants.

Hathaway & Alston, for respondents.

MORRIS, J.—On June 17, 1904, the Walkers and Robert McMurchie, trustee, entered into an agreement for the sale and purchase of certain lands in Snohomish county. The purchase price was $2,750. Of this amount $350 had been paid and received as earnest money, and the balance was to be paid as follows: $337.50 on the day of the date of the contract; $412.50 on or before August 1, 1905, and $412.50 on or before each succeeding August 1, until the full purchase price had been paid. Time was made of the essence. On July, 1904, $337.50, by the terms of the contract due June 17 previous, was paid, and on December 6, 1905, $180.30, balance due August 1 previous, after deducting the agreed price of an improvement, was paid. No other payments were made. On July 2, 1904, McMurchie, trustee, assigned the contract to the Snohomish Berry & Fruit Com-

[1]Reported in 112 Pac. 500.

pany, which immediately went into possession of the property, and commenced making improvements thereon, and ever since has so remained in possession. The two payments in July, 1904, and December 6, 1905, were made by the company to Walker, and it is apparent from the record that Walker knew that the company had succeeded to McMurchie's rights under the contract, and was in possession because thereof. Although he denies any dealings with any one representing the company, he admits he understood McMurchie sold his interest. McMurchie was at all times a trustee of the company, and part of the time its secretary.

Subsequently to December 6, 1905, neither party seems to have paid any attention to the contract, until in April, 1909, Walker deposited the contract in a bank and instructed its cashier to demand the payment of interest, and the bank did in writing so demand of McMurchie, who was at the time a trustee of the company, but taking no active part in its management. The general manager and treasurer of the company was H. S. Wright, and after the bank made its demand of interest of McMurchie one of its officers requested McMurchie to see Wright and have him pay the interest. This it appears was not communicated to Wright; nor is it shown he had any knowledge of the previous demand of McMurchie. No interest was paid and on May 11, 1909, a written notice of forfeiture was served on McMurchie, addressed to him as trustee. On May 14, the company tendered to Walker $2,300, the amount then due on the contract, which was refused as coming "too late," and on May 17, the complaint in this action was served on Wright. The complaint seeks to declare a forfeiture, and the company by its answer asks for a specific performance upon payment of the amount found due. Upon the trial the court found in favor of appellants, holding there was no demand for any of the deferred payments prior to the commencement of the action, and that respondents had waived the time feature of the payments and the right to forfeit, and ordered a decree

for specific performance. Subsequently, upon motion for a new trial, the court took the view that the demand for interest revived the right to forfeiture, and ordered a new trial, from which order defendants appeal.

The basis of the court's finding, that there was a waiver of the time feature of the contract, was its finding from the evidence that, after the company went into possession of the land, and had expended about $1,000 in improving and cultivating it, an understanding was reached between Walker and Wright that a strict performance of the contract would be waived, and that no money need be paid thereunder until demanded by Walker. Although Walker denies such an understanding, we agree with the court that the evidence establishes its existence, strengthened by the fact that Walker lived near the land, knew at all times what was being done thereon in the way of improvement and cultivation, and from December 6, 1905, until April, 1909, made no effort to obtain any payment of either principal or interest upon the contract. Such a forbearance was the result of either an understanding or waiver, or else it was laches. In either event, it would defeat a right of forfeiture until a demand for payment, or other distinct notice of a purpose to enforce a forfeiture unless payment be made, and the lapse of a reasonable time to comply therewith. Equity has ever been jealous of the right of forfeiture, and has never enforced it unless the right thereto has been so clear and insistent as to permit of no denial. And when a party to a contract waives a default in its terms as to payment, he cannot again establish his right to proceed strictly thereunder, until he has given due notice of his intention to the other party. 29 Am. & Eng. Ency. Law (2d ed.), 685; *Cole v. Hines*, 81 Md. 476, 32 Atl. 196, 32 L. R. A. 455; *Watson v. White*, 152 Ill. 364, 38 N. E. 902. Such is the announced rule in this court. *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. 1096.

It is understood that it frequently occurs that a party to

a contract who does not take immediate steps to forfeit it upon default being made, does not thereby lose his rights thereunder, as in *Garvey v. Barkley*, 56 Wash. 24, 104 Pac. 1108. It also frequently occurs, as in *Beltinck v. Tacoma Theater Co.*, *ante* p. 132, 111 Pac. 1045, where the payments are not made when due, but are accepted thereafter, but frequent demands for payment are made and frequent protests against the failure to pay, that such acts do not constitute a waiver. The insistent demands and the frequent protests in the latter case sufficiently assert the right to insist upon a strict performance and protect such right when asserted. But where, as here, we find no demand from the one in possession for over three years, and there is evidence that it was because of an understanding that a strict compliance with the contract would not be insisted upon, it would be inequitable to hold the right to forfeit existed, without putting the other party upon notice of such an intention to so claim. The demand of interest of McMurchie in April, 1909, was not such a notice. Walker knew McMurchie had parted with his interest; he knew the company was in possession of the land; he knew Wright, with whom we find, as did the court below, he had made his agreement to waive a strict performance, was representing the company in its possession and cultivation of the land. Under such circumstances the demands of McMurchie, although a trustee of the company, was not a sufficient or proper demand to revive the right to forfeit. Neither was the notice addressed to McMurchie May 11 sufficient to forfeit the contract against his assignee, the company, under the knowledge of the facts of the situation then known to Walker.

We are therefore of the opinion that the court below was right in its findings upon the trial, and that it was error to grant the new trial, and the order granting same is reversed, and the cause remanded for the entry of judgment upon the findings and conclusions as made by the court.

Rudkin, C. J., Chadwick, Crow, and Dunbar, JJ., concur.

[No. 9144. Department Two. January 5, 1911.]

In the Matter of the Petition of THE CITY OF EVERETT. A. D. AUSTIN *et al.*, *Appellants*, v. THE CITY OF EVERETT, *Respondent*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT OF BENEFITS. An assessment of benefits from the condemnation of land for street extensions through unplatted property should be set aside for manifest abuse of discretion, where the commissioners assessed the unplatted property at about ten times as much as platted property, irrespective of its relation to the streets or the benefits received, arbitrarily assuming that the same was benefited greatly in excess of platted property; and it is an abuse of discretion for the trial judge to select commissioners who will, or influence them to, make such an assessment.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered April 2, 1910, upon findings in favor of the defendant, confirming assessment rolls upon property benefited by a public improvement, after a hearing upon consolidated actions before the court without a jury. Reversed.

Todd, Wilson & Thorgrimson, and *Coleman & Fogarty*, for appellants.

Benj. W. Sherwood, for respondent.

PER CURIAM.—This is an appeal by A. D. Austin and six other owners of property assessed to pay for the extension of Highland and other streets in the city of Everett, from the judgment confirming the assessment roll. Condemnation proceedings were duly had and judgments entered, fixing the amounts to be paid for the property taken and damaged. Thereupon the court appointed one set of commissioners to make up the assessment rolls on the five streets involved in the condemnation proceedings. The five rolls were prepared and a consolidated hearing had thereon, the assessment rolls

[1]Reported in 112 Pac. 658.

being confirmed as to four of the streets and modified by charging up $485 against the general fund in the case of the other street. The facts being the same in each of the five proceedings, and the legal controversy being the same, the cases were consolidated below, and are so treated here.

The errors upon which appellants rely for a reversal are that their property was not assessed according to benefits, and is charged with more than its proportionate share of the cost of the improvement. From an examination of the record, it appears that the commissioners adopted a plan by which they assessed unplatted property at about ten times as much as platted property, irrespective of its relation to the streets, or to the benefits derived therefrom, arbitrarily assuming that, because the property was unplatted, the benefit was greatly in excess of the platted property, and the assessment should therefore be proportionately greater. This resulted in one case of an assessment of $3 upon one lot, while the unplatted property directly across the street for the same area is assessed sixteen times as much. In other cases the difference is $1.50 a front foot upon platted property upon one side of the street, while upon the other side the assessment is about one-eleventh as much. Another discrimination shows an assessment of $2 a front foot on unplatted lands, while lands immediately north thereof and practically in the same relation to the street are assessed at only twenty-eight cents a front foot. The reasons for this discrimination, we think, will be found in the following portion of the record upon the hearing below:

"Cross-examination by Mr. Sherwood: Q. Mr. Adamson, in giving your opinions on these various assessments in these various districts, you have not taken into consideration at all the fact that these property owners that you claim—who, in your opinion were over-assessed, you have not taken into consideration the fact that they were allowed very large awards for the property condemned and taken as part of these proceedings? Mr. Thorgrimson: I object for the reason it is absolutely immaterial. The Court: . . . I so

announced, then, that if I could do it—I wanted to offset the benefits right there. I said if I could do it—I asked the law of the question, and counsel convinced me, I believe, that I could do it. I believe Mr. McKee was there and asked if he didn't think the land was worth more after it was platted than it was before and he said he thought it was, and I took that as pretty good evidence because it agreed with me, and I announced then that if I could do it I would so declare, and counsel said then it would be the duty of the commissioners to take that into consideration, and I did not instruct these commissioners at all but I did—. Mr. Coleman: Mr. Anderson was present at the time? The Court: I have no doubt he was. I meant that the word should be conveyed to the commissioners because I had seen, in the Colby Avenue district and several other districts, what I thought were wrongs done and I didn't propose to sit up here and see it done while I was judge, so I did take this method of substantially telling the commissioners, although they were not appointed—I meant that they should know about it, that this court was not going to see men, who were really benefited by the opening up of a street, hold up a whole community and gain that much more than they ought to, and I didn't like the allowance of great, big damages and I tried to get out of it. I would have allowed a good deal less. Brother Fogarty didn't agree with me at all, because he was interested in that land and I know he shook his head pretty vigorously, as his habit is, and still I have to—without reference to who they are; I always shut my eyes to who they are when I come to deciding these questions. I felt it was not the right thing to do; so I think, right now, the commissioners ought to take that into consideration in awarding benefits—ought to take into consideration the fact that these people are getting pay for something that, ordinarily, they ought not to get pay for. Mr. Coleman: Don't your Honor think that you are going pretty far to say that you wouldn't stand for more than eighty per cent in this matter? The Court: I don't know but what, if the whole matter came up together, the fixing of damages and the benefits, I would say that the man who was forced to dedicate his street was benefited for the full amount of the land taken, because of the fact that every practical real estate man who has any acreage, if he wants to get the most out of it, he plats it into lots and blocks, and he feels that he is

getting back more by giving away the street than by keeping it. If I put the question the other way: What would you do with your land to get the most out of it? why, surely, I would dedicate it and plat it with streets and alleys and so I think that is what every sensible man would do with town property. I say this much now because I want counsel to know where the court is drifting in this particular case. I gave it out—I talked to the city attorney privately and I said to him 'When you recommend commissioners to this court, while I know men differ about this, I have seen so much of what I think injustice to the public done that if they follow out that old idea I will not reappoint them, and I might—if I have power, I will set aside the whole assessment and appoint men that will come more nearly doing what I thought was just.' So I told —I will let the record show that—I told the city attorney that in recommending men I wanted him to take that into consideration, and that I wanted to let him and the commissioners know that that was my idea. I had seen injustice done and I thought about it and it worried me and I didn't propose to let it be done any more, so I laid down the general rule, which I intended to influence the commissioners in doing what I think they have done in this case.

"Mr. Sherwood: As I understand it, then, you overrule the objection? Mr. Thorgrimson: I would like to be heard on that a little further before your Honor passes on that. (Argument.) The Court: I am willing to let the record show that I tried to influence the commissioners to that extent, because, as counsel knows very well, when I gave the awards I said—they said 'You cannot consider the benefits,' and counsel on both sides agreed to it, and still I wanted to see if I couldn't do it. Mr. Coleman: That was a question under the statute. The Court: Then they convinced me that they were right, but I was stretching out my arm just as far as I could then, and if I had had my way about it I would have said to Mr. Coleman and Fogarty and some of the other people there, 'You are benefited more than you are damaged and I won't allow you anything.' That is probably what I would have done if I had any authority, but I didn't have that authority and I figured out that that could be taken care of just in this way, that the commissioners appointed to assess the benefits ought to take that into consideration, that they are getting paid for the land, that the taking away from them

was a benefit to them rather than a damage and that they ought to take that into consideration, that was the only fair way that could result. Now, I am willing to let the record clearly show that, because, if I am wrong, the supreme court can say so. I admit I endeavored to influence the commissioners to the extent that I talked to the city attorney about it, and I said if these commissioners kept on doing the way they have been doing in other cases I will not appoint them and I will set aside the whole assessment roll and I will appoint new commissioners that will more nearly carry out the ideas of the court. I would have been a little more indignant about some cases where I have sustained an assessment, and I furthermore told them if they went onto these side streets where improvements went and levied very large assessments that I would set that aside. I had in mind Colby Avenue, where I thought a wrong was done a lot of people under the guise of law, and I didn't propose to do it nor have it done, as far as I was concerned. That is the fact and I want the record—. Mr. Coleman: The city attorney told me that you wouldn't stand for more than eighty per cent. The Court: I don't think I got down to percentage, but I told him that that should be considered and if they didn't say that they considered that I would probably set the whole matter aside and appoint new commissioners. I told the city attorney that, and I announced to all the litigants in court here before that if I could do it I wouldn't allow these people very large damages, and Mr. Coleman shook his head very vigorously, thought I was entirely wrong, but—the Court did influence, I think, the commissioners. The commissioners had gone, before, on the theory 'Well, we will divide this up all up and down the street.' Here is a man who has platted his land and dedicated his land to the public and got nothing for it, and the man adjoining him that couldn't sell his land at all unless he did plat it and did dedicate the street, he would make the other man pay him damages because he was being benefited, and I didn't think it was fair, didn't think it was just, and didn't think it was right, and I wanted to stop that practice, and I figured the only way I could was by the kind of men I got in as commissioners and whether they would consider the matter or not, and I did that, although in the particular case in which I did it I had some pretty close friends whom I knew were interested directly, but that is the way I believe and that

is what I did, and I did it in the interest of honesty as I look at it and square dealings, and if I am wrong I am wrong, and the record may show just exactly what I did do. I will overrule the objection. Mr. Thorgrimson: Your Honor overrules the objection on the ground that it is material, in making these assessments, as to what the different parties whose land was assessed received as awards for the land taken. The Court: Well, probably not stated in that form, but the question of benefits is whether they had any street there before or not and whether a street is given them in front of their own property that they would have to give anyhow if they were going to sell the property. It is in another form— I think the objection should be overruled. Objectors except."

We think it is apparent, without giving other reasons for our opinion, that the court endeavored to, and did, influence the commissioners in fixing their assessments. Each property owner is entitled to the fair and impartial individual judgment of the commissioners as to the benefits received by his property from the improvement in question, and when he desires to test their assessment in court he is likewise entitled to a fair and impartial hearing before an unbiased court. It is manifest these appellants had neither. Assessment according to benefits is largely a matter of opinion, and while we have often refused to disturb assessments where there was a conflict in the testimony as to the character and extent of the benefits, and have held the assessment roll as handed in by the commissioners and confirmed by the court was conclusive in the absence of fraud or apparent mistake, we have likewise held it will not be so regarded when it appears to have been arbitrarily made, such an assessment being a manifest abuse of the discretion vested in the commissioners. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279.

In the case of *In re Third, Fourth and Fifth Avenues*, 55 Wash. 519, 104 Pac. 799, we said no assessment would be disturbed unless the evidence was so clearly predominating as to indicate that the trial court had lost sight of its judicial discretion in determining its judgment. The

remarks of the trial court, as above quoted, would seem to plainly indicate his mind was not in that equal poise to carefully and considerately weigh the matter before him, and exercise a judicial discretion in arriving at his conclusion.

The order of confirmation is vacated, and the assessment rolls set aside. The cause is remanded with instructions to appoint new commissioners, and prepare new rolls.

[No. 8827. Department Two. January 6, 1911.]

R. F. HAGGARD, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MASTER AND SERVANT—VICE PRINCIPALS—EVIDENCE OF AUTHORITY—ADMISSIBILITY. In an action against a city for injuries sustained by an employee in an electric light station, evidence of the acts of persons claimed to be in charge is admissible to show their authority to give orders and represent the city.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—ADMISSIBILITY—STATEMENT OF OPINIONS. In an action for personal injuries sustained by a city employee in an electric light station, plaintiff's evidence to the effect that he would not have used a passageway had he known that it was dangerous, is not objectionable as the statement of an opinion, but is merely a statement of his ignorance of the dangers and a reaffirmance of his complaint alleging due care.

WITNESSES—EXPLANATION OF TESTIMONY. Upon a second trial of a case, it is not objectionable to allow a witness to explain one of his answers at the former trial by stating how he understood the question.

MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—CUSTOM IN OTHER PLANTS. In an action by an inexperienced youthful employee in a city electric light station, for injuries sustained while working, without instructions, in the high tension room of the plant, it is proper to show whether such is the customary practice in plants of similar character, as tending to show negligence.

NEW TRIAL—GROUNDS—MISCONDUCT OF JURORS—SHOWING. A new trial should not be granted upon the affidavit of appellant's attorney that articles had been published in a newspaper tending to influence

[1]Reported in 112 Pac. 503.

the jury, where he simply stated that he was informed and believed that a majority of the jurors had read the articles, and there was no evidence that the jurors had read them.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $16,333 for electric burns received by a boy eighteen years of age, is not excessive, where he was terribly burned, skin grafting was resorted to, his face was disfigured and deformed, the flesh from one of his legs sloughed out, and his sight was impaired and cataracts induced, which may result in total blindness.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 8, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in an electric lighting plant. Affirmed.

Scott Calhoun and *James E. Bradford*, for appellant.

Higgins, Hall & Halverstadt, for respondent.

DUNBAR, J.—The respondent alleged in his complaint that, while working as a servant for appellant at and in the substation of its lighting plant in the city of Seattle, he being at the time of the age of eighteen years, was ordered by one McKean, whom he alleges was the agent of defendant with authority to order and direct the plaintiff in his work, to wipe up some oil under the oil switches (definitely described in the complaint) and that it was necessary for him, in carrying out said orders, to go through a certain narrow passageway in close proximity to such switches; that a person passing through said passageway was exposed to great danger from shocks of electricity, which might be received without actual contact with the oil switches or by contact with the insulators thereon; that he was ignorant of this fact, and ignorant of all matters concerning electricity; that he did not know, and had not been informed, that such passageway was dangerous, or that shocks might be received therein without actual contact; that this knowledge was possessed by the defendant and that, knowing the dangers incident to the place, it sent the plaintiff there to perform the labor which

he was ordered to do, without warning and without instruction; and that while so working, ignorant of the dangers aforesaid, he was burned and injured by the electricity passing over the switches, describing the injuries which he received. The complaint is long and definite, but we have stated the substance of it. The damages alleged were $20,000. The defendant denied negligence on its part, and charged the plaintiff with contributory negligence and assumption of risk. Upon the issues so framed, the cause was tried by a jury, and verdict was returned for $16,333. Motion for judgment notwithstanding the verdict and motion for a new trial were overruled. Judgment was entered, and appeal followed.

There are fifty-four assignments of error presented here. We will notice those which we consider pertinent. It is insisted that the court erred in admitting testimony relative to the authority of McKean and Moores. It is insisted that there is no evidence that either of them had authority in any way to bind the city, and no authority to give orders. The witness testified that McKean had charge of the sub-station and all the men in it, and that Moores, who was an operator, gave orders in the presence of McKean, and ordered the respondent, in McKean's presence, to use waste in wiping up the oil. He testified further, over appellant's objection, as follows:

"Moores was ordering the men about. McKean had charge of the sub-station and all the men in it, and he ordered everybody around as far as I could see, and everybody did what he told them to."

Conceding the law to be as announced in the many cases cited by learned counsel for appellant, we think the testimony was admissible, and that the best possible way to prove who was actually in charge was to prove the acts of those who were charged with principalship. Contractual relations are sometimes hard to prove by opposing litigants, and the respondent had a right to introduce the best testimony he

could command. At least, the testimony offered was some evidence of principalship, and hence was admissible. Assignments 30 and 31 are grouped with assignment 2 just noticed, and as appellant has made no especial argument to sustain them, we conclude they will fall within the rule just discussed.

It is urged that the court erred in allowing respondent to state that he would not have passed through the passageway had he known it was dangerous, and it is appellant's contention that this was one of the questions for the jury to determine from the facts proven, and should not have been testified to by the respondent as a question of opinion. This was nothing more, in effect, than a statement that he did not know of the danger, and this, as counsel for respondent aptly says, amounts simply to a reaffirmance of the legal intendment from the statements of his complaint, that he was not guilty of contributory negligence; and hence it was without prejudice. Neither do we think any error was committed by permitting the witness to explain an answer which he made to a question on a former trial, by stating how he understood the question which was then asked him.

Assignments 6, 8, 9, and 27 are to the effect that the court erred in allowing the witness McKean to answer, over appellant's objection, certain questions propounded. The assignments are so numerous in this case and the questions objected to so many, that it will not be practicable to discuss them all at length, but we will select one question which practically embraces the principal objections to all of them:

"Q. Is it the practice in plants of the character similar to this plant in question to send inexperienced boys, we will say of the age of eighteen years, who have had no technical education in electricity and who have had no instruction as to its characteristics and methods of operation and who have had no experience in methods of handling it, to work about such switches as that battery of switches in the northeast corner room—of the high tension room of this plant, when the wires are carrying high voltage; that is, 25,000 voltage?"

The objection was as follows:

"By Mr. Bradford: I object to that question and all questions eliciting this line of evidence, for the reason that it is incompetent, irrelevant and immaterial, not within the issues here, asking for a conclusion of the witness, and asking for testimony on an issue of fact which is the exclusive province of the jury to pass upon. It could not in any way bind the city. What somebody else does at some other time or place. For the further reason that it is indefinite as to time, place or circumstances. The Court: On the last ground I think the objection is well taken."

The succeeding questions eliminated the objection as to time, and were asked with reference to the time at which the accident occurred. From the whole testimony on this branch of the case it affirmatively appears that there was no prejudice, and that the inadvertence, if there was an inadvertence, in the first question could not in any possible way have affected the merits of the case. So far as the objection that the questions were not specific enough is concerned, and the argument to sustain the objection that there is a great variety of capacity and discretion of boys of the same age, it is apparent that it would be impracticable to frame a question disclosing the distinguishing capacity of the particular child in all particulars. If it was out of the ordinary, it could be shown in defense. On the general question of the admissibility of testimony showing custom in such cases, this court said, in *Crooker v. Pacific Lounge & Mattress Co.*, 34 Wash. 191, 75 Pac. 632, referring to this question:

"As to the second objection, we think the proof complained of was relevant on the question whether the appellant had exercised reasonable care in not following a custom in guarding ripsaws; not that a compliance with the particular custom would necessarily exonerate, or non-compliance necessarily charge it with negligence; but its conduct in that regard was a material fact for the consideration of the jury, in connection with the other facts and circumstances developed by the evidence in the case;"

citing *Bodie v. Charleston etc., R. Co.*, 61 S. C. 468, 39 S. E. 715, where the court said:

"It was for the jury to say whether such usual or customary method was such as a careful and prudent person should adopt under the circumstances."

In *Sipes v. Puget Sound Elec. R.*, 54 Wash. 47, 102 Pac. 1057, it was said:

"The ruling of the court admitting testimony tending to show the flagging system in use on other roads of like character is next assigned as error. The standard of due care is the conduct of the average prudent man. It would doubtless have been competent for the appellant to show that its flagging system was the one in general use on other roads of like character throughout the country, and it would seem equally competent for the respondent to prove that a like flagging system was not in use elsewhere. Such testimony would not be at all conclusive against the appellant, but it was proper for the consideration of the jury;"

citing *Myers v. Hudson Iron Co.*, 150 Mass. 125, 22 N. E. 631, 15 Am. St. 176, where it was said:

"In order to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery actually in use, it was competent to show what other kind of machinery or appliances were used elsewhere, and might have been used at the shaft."

The admission of such evidence was indirectly approved in *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 86 Pac. 588. The latest expression of the courts upon this subject will be found in *Shaw v. Woodland Shingle Co.*, *ante* p. 56, 111 Pac. 1070. All that was decided in *Carlson v. Wilkeson Coal & Coke Co.*, 19 Wash. 473, 53 Pac. 725, cited by appellant, was that the boy's size, age, previous experience, strength and intelligence could properly be considered by the jury. But the admission of the testimony objected to in this case did not in any way deprive the defendant of submitting such testimony for the consideration of the jury.

In support of a motion for a new trial, an affidavit was made

by the attorney for the appellant, to the effect that certain articles had been published in the city newspapers which tended to influence the jury to the prejudice of the appellant; that eight members of the jury were citizens of Seattle; that the papers publishing this article had a general and popular circulation in the city, and that he was informed and believed that a majority of the jurors actually read said articles. There was no testimony of the jurors showing that they had read the articles, and no testimony other than the affidavit mentioned. Under the authorities generally, the showing of prejudice would not be sufficient; but the question has been squarely decided to that effect in *State v. Murphy*, 13 Wash. 229, 43 Pac. 44, and *State v. Simmons*, 52 Wash. 132, 100 Pac. 269. We have examined all the errors assigned, but without specifically discussing them, we think they are too technical to in any way affect the merits of the case.

We are unable to endorse the criticism on the instructions of the court. Those given properly stated the law, and those refused had either been given in substance or did not properly present the law. Both sides had their respective cases fairly presented in the instructions. We are unable to discover any error in admitting or rejecting testimony. The two meritorious questions (1) whether the plaintiff was guilty of neglect, including the question of whether he had been instructed in regard to his duties and notified of the dangers of the place, and (2) whether the plaintiff was guilty of contributory negligence, were fairly submitted to the jury, whose province it was to determine them, and it has determined them both, on competent and legally sufficient testimony, against the contentions of the appellant.

It is lastly contended that the verdict is excessive, indicating passion and prejudice on the part of the jury. We have examined the testimony on this phase of the case most carefully, and while it is true that this is a large verdict, it is also true that the injury sustained was terrible and lasting. The respondent was burned about the face and head until, as some

of the witnesses testified, he did not resemble a human being, but his face looked like a big piece of meat. The flesh was burned off the back of his hand, and his arm below the elbow was severely burned. One of his legs was so deeply burned that a portion of the flesh sloughed out, and skin grafting had to be resorted to to cover the area burned. He was confined to the hospital for over two months immediately succeeding the accident, before the skin grafting was resorted to. The thigh is left with a depression in it, and his face is left deformed. In addition, his sight is impaired to the extent that he had to give up work that did not require very acute vision, and that according to the testimony, the growth of cataracts has been induced, which are steadily maturing. The testimony shows that cataracts will ordinarily mature in from five to ten years, when total blindness will ensue unless an operation for its removal proves to be successful; and what is termed a successful operation is where the patient is left with a vision ranging from one-half to one-twelfth the normal, and that there is about an even chance that the operation will not be successful in any degree. Considering the pain and suffering endured with the permanent injuries sustained, we are unable to say that the verdict is excessive.

The judgment will be affirmed.

RUDKIN, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

[No. 8934. Department Two. January 6, 1911.]

THE STATE OF WASHINGTON, *on the Relation of the City of Tacoma, Respondent*, v. TACOMA RAILWAY AND POWER COMPANY, *Appellant*.[1]

STREET RAILWAYS — FRANCHISES — TRANSFERS — CORPORATIONS — MERGER. A street railway company's franchise, which compelled the granting of transfers over all lines controlled by it, cannot be invoked to compel the granting of transfers over the line of a competing traction company (also required to give transfers to any other line giving transfers to it) a majority of the capital stock of which had been acquired by a corporation owning the capital stock of the street railway company, although through such control or merger the officers of the street railway were elected officers of the traction company and managed its affairs, the latter's shops and offices were closed, and physical connection was made between the lines; since each corporation continued to exist as distinct entities having contract rights, regardless of the majority holding of their capital stock (DUNBAR, J., dissenting).

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 17, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, awarding a writ of mandamus to compel a universal transfer system on all the street railway lines in a city. Reversed.

B. S. Grosscup and *W. C. Morrow*, for appellant.

T. L. Stiles and *F. R. Baker*, for respondent.

CHADWICK, J.—The Tacoma Railway & Power Company having, prior to April 1, 1903, acquired a number of separate franchises and detached pieces of street railroads in the city of Tacoma, upon which separate fares had been charged and only a partial transfer system inaugurated, entered into a contract with the city, which was designed to settle existing disputes and differences, provide a single fare over all lines controlled by the railway, and to establish a transfer system

[1]Reported in 112 Pac. 506.

covering all the lines controlled by it. Thereafter, by Ordinance No. 1,809, a franchise was granted to the Pacific Traction Company to build and operate a line of street railway in the city of Tacoma. Section 12 of the Ordinance is, in part, as follows:

"And the payment of a fare shall entitle the passenger to a transfer to any other line within the city of Tacoma which may give and receive transfers to and from the lines operated under this franchise, and the presentation of a transfer from any other lines which may give and receive transfers shall entitle the holder thereof to passage on the cars operated under this franchise to any point within the city limits."

The railway company had at all times a line in operation upon Pacific avenue, thence up Ninth street to C street. This line was known as the "Old Town" line. Several of its lines ran up and down C street, so that the intersection of Ninth and C streets was a sort of common center for passenger traffic. The city terminus of the traction company's line was on Commerce street, a street lying between Pacific avenue and C street. The traction company was owned and controlled as an opposition company, each line running to, and serving the population residing in, what is known as "South Tacoma." The traction line crossed the railway line at several places, but there was no physical connection between the roads. Nor did the one transfer passengers to the other. Each maintained different officers and employees, and each owned and operated shops and terminals where cars were kept and repaired. A majority of the stock of the railway company is owned by the Puget Sound Electric Railway.

In the summer of 1909, the Puget Sound Electric Railway acquired a majority of the stock of the traction company, since which time, as it is said, for convenience and economy of administration, and for the mutual benefit of both roads, and especially for the advantage of the traction company, a physical connection between the two lines has been made at the intersection of C and Commerce streets, and also at Fifty-

fourth street. Freight is transferred from one line to the other. The cars of one line, to some extent at least, have been used on the other line. The offices of the traction company have been closed, and all its office work has been put upon the officers and employees of the railway company. The shops of the traction company have been closed and its machinery dismantled, the repairing being all done at the shops of the railway company. The testimony shows, that the accounts and books of the two companies are separately kept; that the freight earnings on transferred freight are apportioned between the two companies by a traffic manager, who acts in the same capacity for both lines; that all repairing chargeable to the traction line is done at actual cost by the railway company, with ten per cent added.

Since the Puget Sound Electric Railway acquired control of the stock of the traction company, that company and the railway company have been managed by the same person, and the same person has been superintendent of both companies. The manager of the railway and of the traction company is not paid by either of them, but by a concern known as the Stone-Webster Company. It is pertinent to add that the railway company is a New Jersey corporation, having at the time of the trial the following officers and board of directors: President, Russell Robb; 1st Vice President, Guy E. Tripp; Treasurer, Henry B. Sawyer; Secretary, Alvah K. Todd; Directors: T. Nelson Perkins, John S. Bartlett, Henry B. Sawyer, Chandler Hovey, Russell Robb, A. S. Michener, John R. Turner, Sidney Z. Mitchell, and Guy E. Tripp. The traction company is a Maine corporation, with the following officers and board of directors: President, Guy E. Tripp; 1st Vice President, Fred S. Pratt; Treasurer, Henry B. Sawyer; Secretary, Alvah K. Todd; Directors: A. S. Michener, E. Howard George, Fred S. Pratt, Alvah K. Todd, and Guy E. Tripp.

It is not shown, nor is any attempt made to show, that the appellant railway company owns any stock in the traction

company, or in any way directs and controls its policy. Nor is the traction company or the Puget Sound Electric Railway, the owner of a majority of the stock of both the local companies, made parties to the suit; the relator's whole claim being that the appellant should bring the traction company within the terms of its settlement agreement with the city, and issue transfers "because every external circumstance pointed toward the conclusion that it was at least operating the traction line of street railway, if it did not in fact own and control it." The following clause of the contract is relied on:

"Fifth: On and after the first day of April, 1903, the said party of the first part [the railway Co.] shall transport any person from any point or place within the corporate limits of the city of Tacoma, on any lines of street railway owned, operated or controlled by said party of the first part to the terminus of its line in Point Defiance Park for a single fare not exceeding five cents, and the party of the first part agrees that it will from and after the date of this agreement extend its present transfer system for a continuous trip one way to and from all lines within the city of Tacoma (and including that portion of the Point Defiance line outside of the city of Tacoma), but nothing in this section shall be so construed as to require the issuance of transfers which can be so used on parallel or other lines as to make possible for a passenger to make a round trip for one fare, nor to prevent the party of the first part from making and enforcing all reasonable rules and regulations necessary, in its judgment, to prevent fraud."

We would be glad to hold with the relator, for nothing can work greater hardship and inconvenience to the public than two lines of street railway, operating in the same community but denying the right of transfer. But the legal effect of such ruling would be to make a judicial decree consolidating two companies which under their franchises were designed to be competing lines, a result generally held to be void on the ground of public policy, or to work a dissolution of the corporate franchise. Not only would the majority stockholders of the traction company have a right to be heard, but the minority stockholder must have his day in court as well. The

right of transfer from one system to another is a matter of contract or right reserved in the franchise, and there is nothing in the railway company's franchise that would compel it to transfer passengers to another if it be independent in law. The remedy is legislative and not judicial.

The decisions of the supreme court of the United States and other authorities which we shall cite, sustain appellant in the legal position it has assumed. In *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, the Pullman company sought to compel the Missouri Pacific Railway Company to haul its cars over certain lines owned, operated or controlled by lease, the fact further appearing that the Missouri Pacific owned a majority of the stock of the other lines. The supreme court of the United States held that the contract of the Pullman company was inoperative, except on the line originally contracted with, the court saying:

"The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain and Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. Practically it may control the company, but the company alone controls its road. In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain and Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of

the corporate business or the control of the corporate property."

In *Button v. Hoffman*, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131, it was said:

"From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary co-partnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity."

In *Exchange Bank of Macon v. Macon Const. Co.*, 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800, the rule is stated:

"Every corporation is a person—artificial it is true, but nevertheless a distinct legal entity. Neither a portion nor all of the natural persons who compose a corporation, or who own its stock and control its affairs, are the corporation itself; and when a single individual composes the corporation, he is not himself the corporation. In such case, the man is one person created by the Almighty, and the corporation is another person created by the law. It makes no difference in principle whether the sole owner of the stock of a corporation is a man or another corporation. The corporation owning such stock is as distinct from the corporation whose stock is so owned as the man is from the corporation of which he is the sole member."

The case of *Missouri Pac. R. Co. v. Bolling* (Ark), 48 S. W. 806, furnishes a concise statement of the rule. Speaking of,

"Evidence tending to prove that the St. Louis, Iron Mountain & Southern Railway Company acquired a greater part of the stock of the Little Rock & Fort Smith Railway Company, and that the Missouri Pacific Railway Company acquired a greater part of the stock of the St. Louis, Iron Mountain & Southern Railway Company, and that several of the officers of the last mentioned companies were the same persons,"

the court said:

"But the evidence shows that the two companies remained separate corporations, and that they, by consent, appointed or selected the same persons officers in each company to reduce their expenses. The facts stated do not show that the existence of one was merged in that of the other. The corporations, and their officers and stockholders, are separate persons. The stockholders and officers might be the same and the corporations different."

To the same effect, *Porter v. Pittsburg etc. Steel Co.*, 120 U. S. 649, 670; *Jessup v. Illinois Central R. Co.*, 36 Fed. 735, 741; *White v. Pecos Land & Water Co.*, 18 Tex. Civ. App. 634, 45 S. W. 207; *Atchinson, Topeka & Santa Fe R. Co. v. Cochran*, 43 Kan. 225, 23 Pac. 15, 19 Am. St. 129, 7 L. R. A. 414; *Regina v. Arnaud*, 16 L. J. Q. B. 50.

The general law is laid down in Cook on Stock and Stockholders and Corporation Law, vol. 1, § 6:

"A corporation is an entity and existence separate from its officers and stockholders. And the inclination of some writers to assimilate a corporation as nearly as possible to a partnership and to apply to the former the rules applicable to the latter leads only to confusion and is contrary to the law. The difference between a corporation and a partnership and the advantages of a corporation over a partnership as a means of doing business are very marked and should not be limited by construction. A corporation is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all the stock does not make him and the corporation one and the same person. Although one railroad corporation owns all the stock of another railroad corporation, yet the separate existence of the two corporations continues and they are not thereby merged."

No authority is cited by the city to meet these cases. But we are asked to find as a fact that the traction company is controlled by the railway company, when the testimony shows that an independent company controls both of them. The underlying principle in all these cases, whether so stated or not, is the contract clause of the Federal constitution. Courts are powerless to compel one company, holding its own franchise, to contract with another, although a majority of the stock be held by the same persons, for the very obvious reason that courts cannot abrogate contracts formally entered into by competent parties. It may be a grave question whether mergers of corporate interests are to be more favored than the preservation of independence between corporations. In the absence of legislative direction, the courts have generally resolved against the policy of merging independent corporations, although in some cases hardship has followed the rule.

The city council of the city of Tacoma having failed to reserve the right to compel the two companies to transfer passengers, the courts are powerless to compel such transfers, so long as they are legally independent of each other. Courts cannot make contracts or supply omissions in contracts, or bind one company by the contract of the other. It may be that, at the time the franchise was granted to the traction company, the city purposely waived the right it might have retained to compel transfers with other lines, but whether the omission comes through design or oversight, the law is the same. The franchise and contract is binding upon both parties as it was written.

Reversed, and remanded with instructions to deny the writ.

RUDKIN, C. J., CROW, and MORRIS, JJ., concur.

DUNBAR, J. (dissenting)—I dissent. I have no fault to find with the principles of law which are enunciated by the majority opinion, or the rule laid down by the authorities therein cited, but think they have no application to this particular case. They apply to *bona fide* transactions and

actual conditions. But from an examination of the record in this case, I am convinced that appellant is attempting to evade its obligations by a denial of the truth; certainly, so far as the operation of the different tracks is concerned; probably, so far as ownership is concerned. The contractual obligation was with reference to lines owned, operated, or controlled; and, interpreting the actions of the appellant rather than its assertions, if the proof in this case does not sustain the city's contention that the appellant is at least operating and controlling the traction line, then in my opinion no proof which will satisfy the law can ever be made where a bare denial is offered by the defendant. These were two lines built and operated as competing lines. The competition was intense, to the extent that ordinary courtesies were refused. There was no trackage connection and, of course, no exchange of cars. The traction company managed its affairs in every particular. But in 1909 the Puget Sound Electric Railway purchased a majority of the stock of the traction line, it already owning the stock of the railway company. They are managed largely by the same directors. Physical connections were then made. The traction company gave up its business office in Tacoma. Cars of each company are used on the lines of the other indiscriminately, a general superintendent was appointed to take charge of both, and in this appointment the traction company had no voice. The repair shops of the traction line were discontinued, and machinery removed to the appellant's shops. All of the managing officers of the traction company quit its service, and it passed absolutely and wholly into the hands of appellant, and its identity was lost. I am assuming, of course, that the Puget Sound Electric Railway, the Tacoma Railway & Power Company, and Stone & Webster are all the same concern. This assumption is justified by the testimony. After this merger, there was nothing left of the traction company as an entity but the filmy system of bookkeeping where the traction company is credited and charged as though it really

enjoyed a separate existence. I am satisfied from the testimony that this is simply a subterfuge, and that the expense of the bookkeeping is many times repaid by the fees which are saved to the company through its agency. The majority say:

"We would be glad to hold with the relator, for nothing can work greater hardship and inconvenience to the public than two lines of street railway, operating in the same community but denying the right of transfer. But the legal effect of such ruling would be to make a judicial decree consolidating two companies which under their franchises were designed to be competing lines, a result generally held to be void on the ground of public policy."

This would be sound doctrine applied to two actually competing lines, but the legal effect of the majority opinion, as I read the testimony, is to permit the inconvenience and hardship which is regretted by the majority, in a case where the public is even deprived of the benefit of competition.

The judgment should be affirmed.

[No. 8926. Department Two. January 6, 1911.]

FIDALGO ISLAND SHINGLE COMPANY, *Respondent*, v. J. W. BROWN *et al.*, *Defendants*, and E. RUEGE *et al.*, *Appellants*.[1]

TROVER AND CONVERSION—WHAT CONSTITUTES—CONDITIONAL SALES. An attempted sale by one holding property under a conditional sale contract, without the consent of the owner, the changing of possession, and the use of the property by the assigns without paying up or acquiring title, is a conversion as against the owner and original vendor.

SAME—PLEADING—COMPLAINT—SUFFICIENCY. A complaint in conversion states a cause of action when it alleges title to the property in the plaintiff, its wrongful taking without consent, demand for payment and refusal, and use, damage and destruction by the defendants.

[1]Reported in 112 Pac. 629.

Same—Defenses—Return of Property. Upon the conversion of property, the owner may treat it as such and is not required to take back the property, whatever its condition.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered December 3, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for conversion. Affirmed.

E. M. Day and *J. F. Moore*, for appellants.

Romaine & Abrams, for respondent.

Morris, J.—Appellants, being held under a judgment of conversion of certain personal property, appeal.

The errors assigned are, the overruling of a demurrer to the complaint; the allowance of an amendment to the complaint; denying motion for judgment; and in the findings establishing the conversion. The complaint alleged that, on January 28, 1909, plaintiff, under a conditional bill of sale, turned the property over to defendant Brown & Nims, at an agreed price of $3,100, which amount it was agreed might be paid by the delivery to plaintiff of certain sized lumber at prices therein fixed; that 150,000 feet of such lumber should be delivered on or before June 1, 1909, and the balance, payable in either lumber or cash, was to be paid during the year 1909.

It was also agreed that the property should be removed to the mill of the Crescent Lumber Company, in Whatcom county, and there kept and properly cared for until wholly paid for, and that title should remain in plaintiffs until so wholly paid for; that Brown & Nims, in March, 1909, delivered to plaintiff lumber of the value of $136.40, which is the only payment made under the contract; that on April 10, 1909, Brown & Nims sold the mill and plant of the Crescent Lumber Company, together with the property in controversy, to defendants Ruege & Cords, the bill of sale evidencing such sale reciting the agreement under which Brown & Nims held the

property, and the amount then due, which Ruege & Cords assumed, Brown & Nims assigning to Ruege & Cords all their interest in the agreement between plaintiff and themselves; that on September 2, 1909, Ruege & Cords assigned their interest in the conditional bill of sale to defendants Mathews & Gilfillan, reciting the amount then due, which Mathews & Gilfillan assumed; that the property has not been properly cared for, and a portion of it has been lost and destroyed; that several demands have been made of the defendants for a delivery of the lumber agreed upon as part payment, or a payment in cash, which have been denied. Judgment was demanded against all the defendants for the amount due. Defendants Brown & Nims were not served. The other defendants joined in a demurrer, upon the ground of defect of parties; that the action was prematurely commenced; that the court had no jurisdiction; and the failure to state a cause of action. The respondent then obtained leave to amend and, by way of amendment, pleaded that the several assignments of the conditional bill of sale were without plaintiff's knowledge or consent, and that the property had been converted by the defendants Ruege, Cords, Mathews and Gilfillan, and that the property had been damaged at least one half its value. The demurrer was then overruled.

We see no error in the allowance of the amendment, nor in the overruling of the demurrer. The attempted sale of the property, the changing of possession, without the knowledge or consent of plaintiff, the use of the property by Ruege, Cords, Mathews and Gilfillan, without having acquired any title thereto, was a conversion as against the plaintiff. *Terry v. Bamberger*, 44 Conn. 558; *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508; *Robinson v. Bird*, 158 Mass. 357, 33 N. E. 391, 35 Am. St. 495; *Carter v. Kingman*, 103 Mass. 517; *Morrill v. Moulton*, 40 Vt. 242; *West Jersey R. Co. v. Trenton Car Works Co.*, 32 N. J. L. 517; *Woods v. Nichols*, 21 R. I. 537, 45 Atl. 548, 48 L. R. A. 773. The complaint showing the title to the property in the plaintiff, its wrongful tak-

ing without the consent of plaintiff, the demand for the lumber, or the agreed price, the refusal, the use, damage and destruction by defendants, stated a cause of action in conversion. *Phillipos v. Mihran*, 38 Wash. 402, 80 Pac. 527.

The evidence was stronger than the complaint in showing that Mathews and Gilfillan, after obtaining the property from Ruege & Cords, removed a portion of the property from the mill plant to where they were conducting a logging camp. There was ample evidence to sustain the finding of a conversion, and there was no error in this respect. What has been said disposes of the questions submitted by appellants. They make some complaint in their brief that the court should have found that the property was reasonably cared for, and could and would have been delivered to respondent at its request. Respondent was under no obligation to receive back the property, after its conversion by appellants, whatever the condition might have been. The use and possession of the property by appellants being in law a conversion, respondent could rightly treat it as such, and hold them to answer for such conversion.

We find no error and the judgment is affirmed.

Rudkin, C. J., Chadwick, Dunbar, and Crow, JJ., concur.

[No. 8979. Department Two. January 6, 1911.]

NELSON V. CAMPBELL *et al.*, *Respondents*, v. GEORGE H. GLAZIER *et al.*, *Appellants*.[1]

REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE—EVIDENCE—SUFFICIENCY. While a deed will not be reformed upon the ground of mutual mistake in the description unless the evidence is clear, the courts will take into consideration any and all facts showing the real intention of the parties; and a deed of a lot will be reformed so as to exclude any portion of an abutting street, then in possession of the vendor, the vacation of which was pending, where such was the intent, as shown by the evidence and the fact that the vendor by agreement removed a building from the lot sold across the line onto the disputed property.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered December 9, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to reform a deed. Affirmed.

Edward V. Lockhart and *Frank A. Luse*, for appellants.

Roberts & Udell, for respondents.

MORRIS, J.—Prior to March 15, 1907, respondents were the owners of lots 6, 7 and 8, block 412, Capitol Hill addition to North Yakima. To the south of lot 8 was a street named West Walnut street, which had not been used as a street since about 1902. Respondents since August 5, 1905, had been in possession of this street, under a deed describing the land originally platted as West Walnut street. They also owned the lots to the south of what was originally West Walnut street. Proceedings had been pending for some time to obtain a vacation of this street, and the vacation ordinance was finally passed on March 4, 1907, taking effect on March 25. On February 19, 1907, the parties hereto entered into an agreement for the sale and purchase of lot 8 and the south

[1]Reported in 112 Pac. 490.

half of lot 7, and on the 15th of March a deed was executed in which the property was described as all of lot 8 and the south half of lot 7, block 412, Capitol Hill addition. Thereafter respondents brought this action, setting forth that, at the time of the sale and purchase, it was understood between the parties that the lands conveyed comprised a tract 75x140, being lot 8 and the south half of lot 7, as shown on the plat, and that it was understood that respondents conveyed, and intended to convey, no portion of the vacated street, and that the deed as written was the mutual mistake of the parties thereto in not so excepting any property south of the south line of lot 8; that appellants claimed title under such deed to a portion of the vacated street; and praying for a reformation of the deed so as to exclude therefrom the vacated street, to quiet title to the same in respondents, and to enjoin appellants from asserting any title thereto. Appellants denied any mistake in the deed, and asserted title thereunder to the vacated street. The issues thus being framed, trial was had, resulting in a decree for respondents as prayed for, and this appeal follows.

It will readily be admitted that the courts will not reform a written instrument conveying title to land, upon the ground of a mutual mistake and error in the description of the premises conveyed, unless the evidence of such error is clear and leaves little or no doubt as to what the real agreement of the parties was; and that the determining fact upon such an issue is what property was actually intended to be conveyed by the one party and acquired by the other. In determining this question, the courts will not only look into the circumstances surrounding and affecting the making of the conveyance, but will take into consideration any and all other facts which throw light upon the real intention of the parties in the making and accepting of the instrument of conveyance. Having these rules in mind, we have carefully examined the record herein, and having done so, we are clear, as was the court below, that it was the intention to confine the area to a

tract 75x140, which would be lot 8 and the south half of lot 7 as platted, and excluding any portion of the vacated street as belonging to or a part of lot 8. Appellants never sought, nor intended to buy, a greater area than 75x140; while respondents were careful in all their transactions to refer to the vacation proceedings then pending, and the effect upon lot 8 as a corner lot, contending if the proceedings to vacate failed, and lot 8 thus became a corner lot in reality as well as upon the plat, it would be worth more money than the price then suggested.

We cannot detail all the evidence, but there is one feature of it that shows, as conclusively as any interpreting fact can show, that it was the intention to reserve and exclude any portion of the street area from the conveyance made. At the time of the conveyance, there was a small barn on lot 8 which respondents desired to retain in case of a sale. To this appellants agreed, and respondents moved the barn onto the disputed tract, just across the south line of the lot, where it has since remained in the possession of, and occupied by, respondents. It seems clear that the barn would not have been, by consent of the parties, so placed unless it was then understood that respondents were moving it onto their own land.

Upon the record we conclude that the judgment of the court below was right, and the same is affirmed.

Rudkin, C. J., Chadwick, Dunbar, and Crow, JJ., concur.

[No. 8960. Department One. January 6, 1911.]

OTTO LEPPER, *Respondent*, v. STETSON & POST LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—APPLIANCES—GUARDS—FACTORY ACT—EVIDENCE—SUFFICIENCY. Whether it was practicable for the rollers in front of an edger in a sawmill to have been guarded under the factory act is for the jury where it appears that they might have been effectively guarded by a stationary rod across the front of the edger and a dead roller in front of the live roller.

SAME — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. Whether an operator of an edger was guilty of contributory negligence in oiling the machine while the rollers were in motion, is for the jury, where it appears that he was instructed to do so, that was the customary practice, oiling had to be done frequently, and to stop the rollers would have caused delay.

Appeal from a judgment of the superior court for King county, Shackleford, J., entered January 28, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by the operator of an edger machine in a sawmill. Affirmed.

John P. Hartman, for appellant.

Caldwell & Riddell, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries, alleged to have resulted to the plaintiff from the negligence of the defendant in not having certain live rollers upon an edger machine in its sawmill properly guarded as required by the factory act. A trial before the court and a jury resulted in a verdict and judgment in favor of plaintiff, from which the defendant has appealed.

The contentions of learned counsel for appellant upon this appeal involve little else than questions of fact. They arise upon the challenge to the sufficiency of the evidence made by appellant's motion for a nonsuit, by its motion for a directed verdict, and by its motion for judgment notwithstanding the

[1]Reported in 112 Pac. 514.

verdict; all of which were denied by the trial court. The evidence is in conflict upon some of the material facts, but a careful review of it convinces us that there was competent evidence submitted to the jury warranting the conclusion that the following facts were established thereby.

The appellant operates a sawmill at Seattle. The respondent had been employed by appellant for some time prior to the time of his injury, as an operator of an edger machine, in the mill of appellant. He was then twenty-eight years old, and was experienced in work of that nature. The machine was the one through which the lumber passed next after leaving the head saw, where it was first sawed from the logs into pieces called cants, varying in thickness from one to six inches. These were then passed through the edger, reducing the lumber to smaller dimensions. This was the work of respondent. There were several circular saws in the edger revolving upon a common shaft, attached thereto in such manner that they could be shifted by certain levers and adjusted at varying distances apart, as might be necessary to produce the varying dimensions of lumber required to be cut from the cants coming from the head saw. In front of the saws, a few inches from their edges, and running parallel with the shaft upon which they revolved were the rollers, one above the other, which it is claimed by respondent were not properly guarded. These rollers were about six inches in diameter, about five feet long, and extended horizontally across the front of the edger about three feet above the floor.

Respondent's working position was immediately in front of these rollers, and consisted principally in passing the cants through them to the saws, the lumber emerging on the other side of the edger reduced to the desired dimensions. It was also his duty to adjust the saws at proper distances apart, by means of levers extending from the shaft upon which the saws revolved, out under the rollers. The outer ends of these levers extended beyond the front of the edger and the rollers some twelve inches, where respondent

could readily grasp them. The saws required change of position as to their distance apart very often, because of the difference in the width of the cants coming from the head saw. These changes in the positions of the saws became necessary on an average upon the arrival of every other cant from the head saw. These levers rested by bearings upon a rod extending horizontally some six inches from their outer ends. It was necessary that the rod and these bearings be oiled about ten times each day. This was also respondent's duty. Almost immediately above this rod and these bearings there was the dial plate, with figures on it by which the saws could be adjusted at proper distances apart. This plate was parallel with and about four inches from the lower roller, and was about on a level with the lowest part of the lower roller. The lower roller was stationary, except that it revolved, while the upper one could be raised from the lower one as much as six inches. This was accomplished by a lever, worked by a rod running horizontally clear across the front of the edger, parallel with and a few inches higher than the top of the upper roller, and about ten inches out from it. The pulling of this rod away from the front of the edger raised the upper roller, while the pushing of the rod towards the edger let the upper roller down upon the lower one, or whatever object was between them, causing the object to be tightly grasped and drawn in upon the saws. There was nothing between respondent's working position and these rollers except the objects we have described.

It was customary to keep the oil can on top of the edger directly over the rollers, the place being a little above respondent's head while standing at his working place. Respondent was injured by having his hand caught by the rollers and drawn in upon one of the saws. He was brushing the sawdust off the rod upon which the bearings of the levers rested, preparatory to oiling the rod, and was reaching for the oil can on top of the edger when his other hand was caught and drawn into the rollers upon one of the saws.

As his hand was caught he was drawn against the rod, which raised and lowered the upper roller in such manner that he could not pull it from the edger, which would have released the grip of the rollers upon his hand. This he tried, but was unable to do. The injury caused by the roller was evidently not near so serious as that caused by the saw. Had the grip of the rollers been released by pushing the rod towards instead of pulling it away from the edger, it is probable that even the injury from the rollers would have been much less, since their grip would have been released at almost the same instant of the catching of his hand. The rod could have been connected so as to raise the roller, by pushing instead of pulling.

These facts, it seems to us, clearly warrant the conclusion that these rollers were not guarded, and that respondent in the performance of his duties was liable to come in contact with them. As to the practicability of effectively guarding them with due regard to their use, there was evidence tending to show that they might have been effectively guarded by having a stationary rod across the front of the edger at a suitable distance from the upper roller, of course high enough to admit a six-inch cant under such rod, and by having a dead roller or some obstruction immediately in front of the lower live roller. The rod for raising and lowering the upper roller proved to be more of a trap than a guard. These conclusions can be reached almost from an examination of the photographs of the edger put in evidence, without the aid of the testimony of experienced machine men which was produced. We are of the opinion that in no event could these questions be decided as a matter of law in favor of appellant.

It is contended by learned counsel for appellant that respondent should have stopped the rollers before attempting to oil the bearing rod under the saw levers, there being an appliance by which this could be done by respondent without stopping the mill. This contention has to do with the question of contributory negligence of respondent, rather more

than the question of guards to the rollers, though counsel seem to argue that this stopping device was in effect a guard. We think, however, that this presents only the question of whether or not respondent was guilty of contributory negligence in attempting to oil the rod while the rollers were in motion. There was competent evidence tending to show that respondent was instructed by the foreman how to oil this rod while the rollers were in motion, and that it was the custom to oil the rod without stopping the rollers. The evidence tended to show that the head saw sent the cants to the edger as fast as they could there be taken care of by rapid work of the edger operator, so that he had to watch his opportunity and act very quickly in oiling the rod. It was not impossible to stop the rollers for that short time, but it evidently would take some time. It also appears that the stopping of the rollers would also stop certain other rollers which carried pieces to the edger from another place, and it was desirable, though possibly not absolutely necessary, to keep such rollers in motion. We think that the jury were fully warranted in believing that the appellant intended that respondent should not stop the rollers while oiling the rod, and we cannot say, in the light of this record, that the acts of respondent were so apparently dangerous as to make him guilty of contributory negligence as a matter of law. This question was also for the jury. *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Whelan v. Washington Lumber Co.*, 41 Wash. 153, 83 Pac. 98, 111 Am. St. 1006; *Hoveland v. Hall Bros. Marine R. etc. Co.*, 41 Wash. 164, 82 Pac. 1090; *Hansen v. Seattle Lumber Co.*, 41 Wash. 349, 83 Pac. 102; *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 3; *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 86 Pac. 588; *Benner v. Wallace Lumber & Mfg. Co.*, 55 Wash. 679, 105 Pac. 145; *Anderson v. Pacific National Lumber Co.*, 60 Wash. 415, 111 Pac. 337.

Learned counsel for appellant place some reliance upon

Daffron v. Majestic Laundry Co., 41 Wash. 65, 82 Pac. 1089, and *Johnston v. Northern Lumber Co.*, 42 Wash. 230, 84 Pac. 627. We think, however, that these cases can be readily distinguished from the one before us. In those cases, not only was there a *bona fide* effort to comply with the factory act, but the injuries occurred in a manner not reasonably to be anticipated. We think that, so far as the dangers of the rollers are concerned, this injury occurred in just such a manner as would be expected. Their danger consisted of the possibility of a person being caught between them. Suitable guards would have prevented a person coming in contact with them, except in a deliberate attempt to do so.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, MOUNT, and GOSE, JJ., concur.

[No. 8974. Department One. January 6, 1911.]

CHESTER S. SMITH, *Appellant*, v. CHARLES S. CRAIG, *Respondent*.[1]

BROKERS—CONTRACT—AUTHORITY TO MAKE. Where brokers exceeded their authority by reducing the price, including a guaranty and guaranteeing the number and kind of apple trees, their contract of sale is not binding upon their principal, especially when made subject to his approval.

SAME—RATIFICATION OF CONTRACT. In such a case, the contract as made is not ratified by the fact that the owner thereafter offered to consent to the reduced price, agreeing to make a list of the trees, although the brokers thereupon struck out the guarantee as to the trees.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered March 14, 1910, in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action for specific performance. Affirmed.

[1]Reported in 112 Pac. 513.

Herr, Bayley, Wilson & Smith, for appellant.

Reeves & Reeves, for respondent.

PARKER, J.—This is an action to enforce specific performance of a contract alleged to have been entered into by the defendant, by his duly authorized agents, with the plaintiff for the sale of land in Chelan county. A trial upon the merits resulted in a judgment in favor of the defendant, dismissing the case, from which the plaintiff has appealed.

The facts upon which the rights of the parties depend are for the most part undisputed, and may be briefly stated as follows: On December 31, 1909, the respondent, being the owner of the land, signed and gave to Wright & Dow, real estate agents of Seattle, written authority to sell the land, agreeing to compensate them therefor by paying five per cent commission upon the sale price. The provisions of the writing giving such authority to sell and fixing the terms of the sale are as follows:

"Wright & Dow— Seattle, Wash., Dec. 31, 1909.

"In consideration of one dollar and services to be performed by you in endeavoring to effect a sale of the following described property, viz. . . . . .

"The undersigned owner of said property, hereby give and grant unto you for the period of ..... days from date hereof and thereafter until withdrawn by ten days' written notice, the right to sell said property, and agree to convey the same, or cause the same to be conveyed, by good and sufficient warranty deed to the person or persons designated by you. The price of said property to be $10,000 and upon the following terms: 1-3 cash, balance in three annual payments at eight per cent, ...

"Chas. S. Craig, Owner."

Thereafter, on January 4, 1910, assuming to act under this authority, Wright & Dow, in pursuance of negotiations with appellant, executed a writing with him, the provisions of which, so far as necessary to be here noticed, are as follows:

"Seattle, Wash., January 4, 1910.

"$500—

"Received of Chester S. Smith, hereinafter mentioned as the purchaser, the sum of five hundred dollars ($500) as earnest money and in part payment for the purchase of certain real estate in Chelan county, state of Washington, and particularly described as follows, to wit: . . . . . together with any and all improvements thereon, which includes a good and sufficient water right to above described land which we have this day sold to the said purchaser for the sum of nine thousand ($9,000) dollars on the following terms, to wit: Five hundred ($500) dollars as hereinabove receipted for. Three thousand ($3,000) dollars on approval of abstract. Two thousand ($2,000) dollars on or before one year. Two thousand ($2,000) dollars on or before two years. One thousand five hundred ($1,500) dollars on or before three years. Interest at 8 per cent, payable annually.

"It is agreed that if the title to the said premises is not good, or cannot be made good within 60 days, or if the owner does not approve the above sale, this agreement is void, and the earnest money herein receipted for shall be refunded. But if the title to the said premises is good, and the above sale is approved by the owner, and the purchaser neglects or refuses to comply with any of the conditions of this sale, then the earnest money herein receipted for shall be forfeited to Wright & Dow to the extent of their agreed-upon five per cent commission, and the residue to the owner of the said premises. . .

"The purchaser would want owner to guarantee that the following varieties are within 10 per cent of being correct: Rome Beauties 120, 6 and 7 years old. Winesap 400, 2 years old. Winesap 160, 6 and 7 years old. Spitzenberg 96, 6 and 7 years old. Grimes Golden 90, 6 and 7 years old. Lovers 50, 6 and 7 years old. . . . . Time is the essence of this contract.

"Wright & Dow, By C. H. Dow, Agents.

"I hereby agree to purchase said property on the above terms and pay $9,000 as specified above.

"Chester S. Smith, Purchaser.

"Approved by ....., Owner."

Soon thereafter this writing was sent to respondent at Spokane for approval. He declined to approve it, and wrote to Wright & Dow the following letter:

"Hale Hotel, Spokane, Wash., January 7, 1910.
"Wright & Dow, Seattle, Wash.
"Dear Sir: I am not anxious to do business under the contract you sent me. Upon receipt of the $500 earnest money to me and carfare both ways to Peshastin and expense otherwise incurred, I will make a list of all trees on the 10 acres I have for sale. Price to be $9,000 because you have went to the expense of going to show the place, also because you did not get my letter of January 2d prior to the sale you referred to. Otherwise price is $10,000.
"Yours very truly,
"Chas. S. Craig."

Wright & Dow, with consent of appellant, then struck out of the writing the clauses relating to the guaranty of fruit trees, and sent it to a Spokane bank with the $500 for appellant, notifying him thereof by letter. Respondent went to the bank, examined the writing, and refused to approve it or accept the $500.

The contentions of learned counsel for appellant, as we understand them, present two questions. It is contended, first, that the authority of Wright & Dow was sufficient to enable them to enter into a contract of sale binding respondent, such as that executed by them and appellant; and second, that such writing as modified, by striking out the fruit tree guaranty, was ratified by respondent by his letter of January 7th. A comparison of the sale contract of January 4th with the written authority given to Wright & Dow as agents on December 31st will show that, in several particulars, that sale contract exceeded their authority. It assumed to contract for the sale at a less price than was authorized; it assumed to include a "good and sufficient water right," in effect guaranteeing that such water right went with the land; and it assumed to guarantee the quantity and varieties of the fruit trees upon the land. We find nothing in the agents' authority enabling them to bind respondent by such a contract as this. Their authority seems to be clearly defined in the writing of December 31st, and had they entered into a

contract of sale for the land strictly within that authority, no doubt it would have been binding upon respondent, as heretofore held by this court. *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361, and authorities there cited.

In this connection some contention is made that, after giving the written authority and before January 4th, respondent orally authorized the sale at $9,000. The evidence upon this question is not very satisfactory and is somewhat in conflict; but we are inclined to resolve it in respondent's favor. However, it is not pretended that there was any oral authorization for the other matters in which the contract exceeds the written authority. In addition to all this, it will be noticed that the very terms of the contract clearly indicate that it was made subject to respondent's approval; amounting practically to an admission that the agents were not authorized to enter into a binding contract with appellant like that of January 4th. We are of the opinion that, at the time of making such contract, Wright & Dow were without authority to make the same for respondent.

We are not able to reach the conclusion that the letter of January 7th amounted to an approval of the contract. That letter clearly was not an approval of the contract then submitted to respondent, and we do not think it can be construed as an approval of the contract which was submitted to him thereafter. It is true that the contract finally submitted was like the first one, with certain features eliminated which respondent had objected to, but it was after all another contract, and he cannot be held to have approved it prior to its submission to him, notwithstanding it may have been in such form that his letter of January 7th indicates he might not have objected to it. He was privileged to withhold his approval for any reason he saw fit.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9093. Department One. January 6, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. C. A. LAWS, *Appellant*.[1]

INDICTMENT AND INFORMATION—DUPLICITY—LARCENY. An information for larceny is not bad for duplicity in that it charges the stealing of specified articles from the persons of, and belonging to, two parties, where *prima facie*, both occurred at the same time and place and constituted but a single transaction (overruling *State v. Bliss*, 27 Wash. 463).

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered July 1, 1910, upon a trial and conviction of the crime of grand larceny. Affirmed.

Gus L. Thacker (Hayden & Langhorne, of counsel), for appellant.

J. R. Buxton, for respondent.

PARKER, J.—The defendant was convicted of the crime of grand larceny, upon an information the charging part of which is as follows:

"The said C. A. Laws in said Lewis county, state of Washington, on to wit: the 16th day of December A. D. 1909, then and there being, one certain watch of the value of $20; one gold plated chain of the value of $1; one twenty dollar gold piece of the United States of America of the value of $20; one certain bank note for the payment of and of the value of $5; one certain silver dollar of the United States of America of the value of $1; sundry silver and nickle coins of the United States of America of the value of $1.15, of the personal property of one Ed. Johnson, and one gold filled watch of the value of $40; one watch chain of the value of $4; one certain cloth overcoat of the value of $8, of the personal property of one Axel Johnson, from the person of the said Ed. Johnson and Axel Johnson did feloniously take, steal and carry away."

[1]Reported in 112 Pac. 488.

The defendant demurred to this information upon the ground, among others, "that more than one crime is charged in said information." The demurrer was overruled by the court, and thereafter upon a trial, verdict and judgment were rendered against the defendant, from which he appeals to this court, assigning as error the overruling of the demurrer.

The only contention made by learned counsel for appellant is that the information charges more than one crime, and for that reason does not conform to the requirements of Rem. & Bal. Code, § 2059, which provides that:

"The indictment or information must charge but one crime, and in one form only, ..."

It is insisted that this case is controlled by *State v. Bliss*, 27 Wash. 463, 68 Pac. 87, since this information is in substance the same as the one there held to be demurrable upon the ground here urged. That decision, it must be conceded, seems to fully support the contention of learned counsel for appellant. There are, however, two decisions of this court rendered since then which have the effect of overruling *State v. Bliss*, and clearly support the contention here made by the learned prosecuting attorney that the information does not charge more than one crime. They are *State v. Butts*, 42 Wash. 455, 85 Pac. 33, and *State v. McCormick*, 56 Wash. 469, 105 Pac. 1037. The holding of these cases seems to be supported by the weight of authority. Chief Justice Jordan, speaking for the supreme court of Indiana in the case of *Furnace v. State*, 153 Ind. 93, 54 N. E. 441, reviewing the question somewhat critically and citing many authorities, said:

"The information charges: 'That William Furnace . . . on the 29th day of March, 1898, at the county of Sullivan and state of Indiana, did then and there unlawfully and feloniously steal, take, and carry away of the personal goods and chattels of said Jane Engle $5 in money, and the personal goods and chattels of Samuel Engle, $4.50 in money, contrary,' etc.

"It is urged by appellant's counsel that the pleading embraces two distinct and separate larcenies in the same count

and is thereby rendered bad for duplicity. The question in respect to the duplicity of the information depends upon whether it *prima facie* can be said to disclose that two distinct, separate offenses were committed by the defendant in stealing the property as charged. The amount of money stolen in the aggregate was $9.50, $5 of which, it appears from the averments of the pleading, belonged to Jane Engle, and the remainder to Samuel Engle. The information, with a slight or immaterial change, may be read as follows: That William Furnace, at the time and place stated, 'did then and there unlawfully and feloniously steal, take and carry away' $5 in money of the personal goods of Jane Engle and $4.50 in money of the personal goods of Samuel Engle. Then, as an adverb of time, means 'at the time,' referring to the time stated, and the necessary import of the words 'then and there,' as employed in the information, is that the larceny of the $9.50 in money as a whole, a part of which is charged as belonging to Jane Engle and a part to Samuel Engle, occurred at the same time and place and constituted but a single transaction. . . .

"We recognize no good reason to depart from what may be considered the great current of authority and hold the pleading in question bad, when it can reasonably be said that it discloses that the larceny complained of was but a single act or transaction in violation of the law against larceny, although the property which was the subject of the crime belonged to several different persons. The particular ownership, as charged in the pleading, of the money stolen did not give character to the act of stealing it, but was merely a part of the description of the particular crime charged to have been committed. The information, *prima facie*, under the circumstances, can be said to charge but one offense against the state, and is not open to the objection that it is bad for duplicity. The following authorities support our conclusion: *Hoiles v. United States*, 3 MacArthur (D. C.) 370; *State v. Hogan*, Charlt. (Ga.) 474; *State v. Larson*, 85 Iowa 659, 52 N. W. 539; *State v. Paul*, 81 Iowa 596, 47 N. W. 773; *State v. Nelson*, 29 Me. 329; *State v. Warren*, 77 Md. 121, 26 Atl. 500, 39 Am. Dec. 401; *Bushman v. Commonwealth*, 138 Mass. 507; *People v. Johnson*, 81 Mich. 573, 45 N. W. 1119; *Lorton v. State*, 7 Mo. 55, 37 Am. Dec. 179; *State v. Morphim*, 37 Mo. 373; *State v. Merrill*, 44 N. H. 624; *State v. Hennessey*, 23 Ohio St. 339, 13 Am. R. 253; *Fulmer v.*

Commonwealth, 97 Pa. St. 503; *Addison v. State*, 3 Tex. Ct. of Appeals, 40; *Alexander v. Commonwealth*, 90 Va. 809, 20 S. E. 782; *Territory v. Heywood*, 2 Wash. Ter. 180, 2 Pac. 189; *Regina v. Bleasdale*, 2 Car. and K. 765; *Regina v. Giddins*, Car. and M. 634; *United States v. Patty*, 2 Fed. 664; *United States v. Scott*, 74 Fed. 213."

The judgment is affirmed.

RUDKIN, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9106. Department One. January 6, 1911.]

C. D. HAYES, *Appellant*, v. THE CITY OF VANCOUVER, *Respondent*.[1]

MUNICIPAL CORPORATIONS—TORTS—FLOODING PREMISES—LIABILITY OF CITY. A city is liable for damages resulting from flooding premises by pumping water into a sewer, in an effort to remove an obstruction, knowing at the time that such damage would probably result, and cannot plead that the act was done in a governmental capacity.

Appeal from a judgment of the superior court for Clarke county, McMaster, J., entered June 4, 1910, upon sustaining a demurrer to the complaint, dismissing an action in tort. Reversed.

James P. Stapleton and *F. W. Tempes*, for appellant.

P. J. Kirwin, for respondent.

PARKER, J.—The questions involved in this appeal arise upon the defendant's demurrer to the plaintiff's complaint. The complaint alleges, in substance, that the defendant is a city of the third class; that plaintiff and certain other persons were the owners of certain merchandise, kept by them for storage and sale in the basements of the buildings situated at the intersection of Main and Seventh streets, in the city of

[1]Reported in 112 Pac. 498.

Vancouver, the defendant, at the time of the doing of the acts by the city which are complained of; that the defendant maintained a sewer on Main street running north and south past the buildings, having its outlet south of the buildings; that the buildings have the usual water-closet connections with the sewer; that on March ...., 1909, the sewer became clogged and obstructed at a point south of the buildings so that the flow of water therein was interrupted; that the defendant city in attempting to remove the obstruction turned a large and powerful stream of water into the sewer at a point north of the buildings; that the water so turned into the sewer did not flow through it, but stopped at the obstruction and backed up into and overflowed the connections made therewith and flooded the basements where the merchandise was stored, thereby damaging it; "that the defendant's servants, agents and employees in so flooding said premises were cautioned about said water coming into basements and damaging goods of plaintiff and others, but disregarded said caution and carelessly, negligently and wilfully said defendant, through its said servants, agents and employees, continued to pump said stream of water into said sewer and against said obstruction and wilfully, carelessly and negligently continued to so pump after knowing said basements were being flooded." After alleging the amount of damages to the merchandise of the respective owners, it is alleged that their claims were assigned to plaintiff; and judgment is prayed for accordingly. The defendant's demurrer was interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer being sustained by the court, and plaintiff declining to plead further, judgment was accordingly entered dismissing the action. From this disposition of the cause, the plaintiff has appealed.

Learned counsel for the city contends that, in turning the stream of water into the sewer to remove the obstruction, the city was performing a governmental function of such nature that it was not liable for the injuries alleged to have resulted

to the merchandise belonging to respondent and his assignees. When damages result to persons or property from the acts of the city through its servant it is not always easy to determine as to whether or not such acts are so purely governmental in their nature as to relieve the city of liability for damages resulting therefrom. We do not find it necessary, however, in this case to determine the exact line of demarkation between these two classes of acts on the part of the city, for we think the great weight of authority supports the view that the results of the acts of the city here alleged, performed with the knowledge it then possessed, are such as the city is bound to respond in damages for. According to the allegations of the complaint, it is plain that this injury was the result of an obstruction in the sewer, combined with a positive direct act of the city, with knowledge on its part of the damage likely to result from the obstruction and such act. Even if this injury be regarded as the result of a defective sewer outlet and the natural flow of water therein, it would not fall within that class of governmental acts performed by a city resulting in damages to private property from which the city would be relieved of liability.

In Abbott, Municipal Corporations, § 959, it is stated:

"The determination to construct a system of drains or sewers is regarded as a discretionary act and the adoption of a location or a plan of work or a comprehensive scheme and plan for drainage, unless palpably bad, partakes of the same nature. Any injuries which may result, therefore, from defects in a reasonable plan or scheme as a whole or in part, can create no liability. The operation of this rule, however, will not prevent a recovery for injuries suffered by a failure to provide a suitable outlet for such a system, or for the construction of drains or sewers lacking in capacity to carry off the natural drainage or sewage from the territory designed."

If this was the sole ground of recovery here, the city might be able to escape liability, upon failure of respondent to prove there was negligence on its part in allowing the sewer to become obstructed, but that would not relieve the city upon the

ground that it was performing a governmental act of the class contended for. Under such circumstances the city would be relieved of liability for the same reasons only as a private corporation or person would be. According to these allegations the city not only allowed the sewer to become obstructed, whether negligently or not is immaterial to this inquiry, but by its positive act artificially increased the flow of water in the sewer, resulting in the damage, and knowing at the time that such damage would probably result from its act. In the case of *Ashley v. Port Huron*, 35 Mich. 295, involving the flooding of premises by the act of the city from one of its sewers, Judge Cooley, at page 300, said:

"It is very manifest from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other."

The decisions of the courts relating to damage caused by cities in maintaining sewers and drains, especially where the damage is the result of a positive direct act of the city, seem to be quite uniform in holding that the city is liable for such damage, and that it cannot escape upon the plea that it was the result of the performing of a purely governmental act. *City*

of Eufaula v. Simmons, 86 Ala. 515, 6 South. 47; *City of Atlanta v. Warnock*, 91 Ga. 210, 18 S. E. 135, 44 Am. St. 17, 23 L. R. A. 301; *Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591; *City of Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Van Pelt v. Davenport*, 42 Iowa 308, 20 Am. Rep. 622; *Allen v. Boston*, 159 Mass. 324, 34 N. E. 519, 38 Am. St. 423; *Seaman v. Marshall*, 116 Mich. 327, 74 N. W. 484; *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *Nims v. Troy*, 59 N. Y. 500; *Seymour v. Cummins*, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126, note 128; *Hart v. Meillsville*, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952.

We are of the opinion that, if the allegations of the complaint are true, the city is liable the same as if the alleged damage had been caused by a private corporation or person. It follows that the complaint states a cause of action. The judgment is reversed, with instructions to overrule the demurrer.

RUDKIN, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 8989. Department One. January 6, 1911.]

EVA LEVY *et al.*, *Appellants*, v. THE CITY OF SEATTLE *et al.*, *Respondents*.[1]

PLEADING—ISSUES AND PROOF—DEMURRER—EFFECT. The sustaining of a demurrer to affirmative defenses does not entitle the plaintiff to judgment on the pleadings where other issues are presented by denials in the answer.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT FOR BENEFITS—EMINENT DOMAIN—VERDICT OF NO DAMAGES—EFFECT. Where proceedings to condemn land for the purpose of widening a street are conducted separately from a proceeding to regrade the same, a general verdict that the remainder of abutting lots were damaged one dollar by the taking more than they were benefited, and sustained no damage by reason of the regrade, does not exempt the lots from an assessment for benefits for the regrade, the implication being rather that the property would be benefited thereby.

[1]Reported in 112 Pac. 639.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 30, 1910, after a trial on the merits before the court without a jury, dismissing an action to cancel an assessment upon property benefited by a local improvement. Affirmed.

Carkeek & McDonald, for appellants.

Scott Calhoun, James E. Bradford, O. B. Thorgrimson, and *Leander T. Turner*, for respondents.

MOUNT, J.—This action was brought by the plaintiffs to set aside an assessment levied upon their property for local improvements, and also to restrain the city and its officers from enforcing collection of the assessment. The action is based upon the alleged ground that the property of the plaintiffs was not liable to assessment because in a prior condemnation proceeding, where a portion of the plaintiffs' property was taken, it was determined that the property was damaged in the sum of one dollar over and above the benefits accruing by reason of the improvement. For answer to the complaint, the defendants denied that it was determined in the condemnation action that the plaintiffs' property was damaged over and above the benefits, and alleged two affirmative defenses. The first defense was, in substance, that in the condemnation case, no damages were found for change of grade. The other defense, by way of estoppel, was that the city relied upon the legality of the proceedings and had let contracts and expended large sums of money in said improvements, with plaintiffs' knowledge and without objection thereto. The trial court sustained the plaintiffs' demurrer to these affirmative defenses. Thereafter the case was tried upon the issues made by the complaint and answer, and the action was dismissed. The plaintiffs appeal.

The facts are not disputed. It appears that in May, 1906, the city of Seattle passed an ordinance providing for the widening of Third, Fourth and Fifth avenues, twelve feet on each side, and establishing new grades for these streets. There-

after the city began proceedings to acquire the necessary land and to ascertain the damages on account of private property taken and damaged. The plaintiffs were made parties to those proceedings. On a trial the jury therein returned a verdict as follows:

"We, the jury in the above entitled proceedings, duly empaneled and sworn to ascertain the just compensation to be made to the owners, occupants and persons otherwise interested in the following described real property, to wit, the west twelve feet of lots 3 and 4 in block J, in Bell's Fifth addition to the city of Seattle, which the respondents Eva Levy and Henry E. Levy, her husband, and the Northwestern Mutual Life Insurance Company, a corporation, claim to own, or to be otherwise interested in, find that the just compensation to be paid to the owners, occupants, and other persons interested therein for the taking of said described real property, is the sum of $4,750, and we assess the damages to the remainder of the lots by reason of the taking of said described real property at the sum of one dollar, and we assess the damages to the remainder of said lots by reason of the taking and establishing of the grades and grading and the regrading of Third, Fourth, and Fifth avenues and other streets, avenues, alleys, and approaches thereto described in ordinance No. 13,776 of the city of Seattle in conformity with such established grades and in the construction of the necessary slopes and retaining walls for cuts and fills upon the real property abutting on the streets, avenues, alleys and approaches thereto as provided for and specified in said ordinance No. 13,776, at the sum of no dollars."

Subsequently a judgment of appropriation was entered in accordance with the verdict, and the plaintiffs were paid and received the money for the taking and damaging of their property. In December, 1908, the city passed an ordinance providing for the improvement of these streets by regrading them, and providing also for an assessment district to pay for such improvements. A contract was awarded for doing the work, and an assessment roll was prepared. The property of the plaintiffs was assessed for the sum of $6,642.24. The plaintiffs made no objection to this assessment roll. In Jan-

uary, 1909, an ordinance was passed confirming the assessment and declaring the same a prior lien upon the property assessed. In February, 1909, the assessment roll was placed in the hands of the city treasurer for collection, and plaintiffs were thereafter notified to pay the assessment on or before May 21, 1909. They thereupon brought this action to set aside the assessment.

It is argued that the trial court erred in not granting plaintiffs' motion for judgment on the pleadings. This contention is based upon the fact that the court had sustained a demurrer to the affirmative defenses, and that such ruling became the law of the case. There is no merit in this contention, because the denials in the answer were sufficient to put the plaintiffs upon proof that the assessment roll was void. The first affirmative defense was no more than a denial of the allegations of the complaint. But when the demurrer was sustained to that defense, the effect was not to hold that no proof was required on the part of the plaintiffs. The trial court was of the opinion, no doubt, that the affirmative matter pleaded was fully covered by the denials, and did not constitute an affirmative defense, and for that reason sustained the demurrer to that defense. The law of the case was established only as to the affirmative defenses, and not as to the answer denying the allegations of the complaint.

It is next argued that the court erred in dismissing the action. This contention is based upon the claim that the grading and regrading of the streets was one subject and the two features constituted one improvement, and the question of damages and benefits was determined by the jury in the condemnation proceeding. It is, no doubt, true that the city, when it passed the ordinance providing for widening the streets by twelve feet on each side, intended also to regrade the streets at some future time. But the city was not bound to make the whole improvement at one time, and did not do so. The necessary land was acquired first by an independent proceeding in condemnation. In that proceeding the jury

found that the just compensation to be paid to the appellants for the property which was taken was $4,750, and for damages to the land not taken was one dollar, and that there were no damages by reason of changing the grades and grading or regrading the streets. The jury, by finding that there were no damages to the remaining property by reason of the grades and regrading, did not find that the property would not be benefited thereby. The implication, if any is to be drawn from that finding, is that the property would be benefited, and therefore the case of *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106, is not in point. In *In re Blewett Street*, 59 Wash. 485, 110 Pac. 29, we said upon this point:

"In the absence of special findings, it cannot be now determined whether the jury actually offset benefits against damages. Benefits have since been found by the board of eminent domain commissioners, as the basis of an assessment. The appellant, upon the hearing of her objections, was entitled to show, if such was the fact, that no benefits had resulted to her property from the improvement, but she could not make that showing in the manner attempted, or by proceeding upon the theory that the general verdict of the jury, aided by the repetition of the evidence admitted on the condemnation trial, would establish her contentions."

It follows that, if the acquisition of the land and the improvement of the streets was one unified scheme, there is nothing in the general verdict in condemnation to justify the contention that the appellants' property was not liable to assessment for benefits. But the proceedings were conducted separately. The acquisition of the land was an independent proceeding. The assessment for the benefits was also independent of the condemnation proceedings, and was made after the land was taken and after compensation had been made therefor and damages to the land not taken had been paid.

The assessment was properly made, and was, in our opinion, valid. The judgment must therefore be affirmed.

Rudkin, C. J., Parker, Gose, and Fullerton, JJ., concur.

[No. 9133. Department One. January 7, 1911.]

J. R. PICKLE, *Appellant*, v. LINCOLN COUNTY STATE BANK *et al.*, *Respondents*.[1]

FRAUD—EVIDENCE TO ESTABLISH—SUFFICIENCY. Fraud in an accounting and settlement, which resulted in the plaintiff's execution of a note and mortgage for $11,000 for the balance found due, is not established by clear and convincing testimony, where the plaintiffs claimed that the note was represented to them as being drawn for $1,100, and they knew at the time that they were indebted in a much larger sum, and the evidence of the defendants indicates that the original accounting was correct.

Appeal from a judgment of the superior court for Lincoln county, Kennan, J., entered January 22, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for an accounting. Affirmed.

John M. Gleeson and *Joseph F. Morton*, for appellant.

H. J. Hibschman and *Sessions & Warren*, for respondents.

PER CURIAM.—This is a bill in equity for an accounting. There was a judgment for the defendants. The plaintiff has appealed.

The complaint alleges, in substance, that the respondents induced the appellant to execute a note and mortgage for $11,000, upon the representation that they were drawn for $1,100, and that the latter amount represented the entire indebtedness of the appellant to the respondents. It appears from the evidence that there was a settlement between the parties on June 6, 1908. At that time the appellant and his wife executed their note and mortgage for $11,093. The appellant and his wife and the respondents on the same day signed a statement that they had settled and adjusted all their prior business transactions; that there was due

[1]Reported in 112 Pac. 654.

from the appellant and his wife $11,093, and that they would execute their note and mortgage for that amount. Some time after the settlement was completed, a representative of the appellant demanded a further statement from the respondents, and they said to him that they would furnish it if the appellant and wife would produce their bank books and checks, and that if appellant and wife desired, they would have the bank books examined and an account made by an expert accountant. This offer was not accepted. At a later date the books of the bank were examined by an attorney for appellant, and he reported to appellant and wife that if there was any discrepancy in the accounts, it was in their favor.

One of the respondents, while being cross-examined, several times stated that there was a record of the matters which made up the $11,093, and that with very little delay he could produce it. But appellant insisted upon his stating the transactions without the aid of the books. The witness finally said: "I should think if you wished to know, I could get it for you in a minute." He, however, did give a statement from memory which showed that, on the day of the settlement, the appellant and wife were owing a number of notes and an overdraft which, including a judgment against them and paid by the respondents, aggregated about $11,000. At the close of the case, the court said: "I am of the opinion that Mr. Pickle's testimony is utterly unworthy of belief, and that there has been an utter failure to show any fraud in that settlement, and that the defendants are entitled to judgment." It appears from the testimony of the appellant and wife that they knew that a much larger amount than $1,100 was due at the date of the settlement. Moreover, they knew that the respondents paid for them on that date in satisfaction of a judgment, and an attorney's fee, the sum of $2,250. As the learned trial court aptly said, they knew that if the note and mortgage were drawn for $1,100, there was a mistake in their favor, and common honesty

demanded that they should have had it corrected. Fraud is never presumed, but must be established by clear and convincing evidence. This is especially true where a party assails the integrity of written instruments. The trial court saw the witnesses, observed their manner while testifying, and arrived at the conclusion that the appellant failed to make a case which warranted an accounting. A careful reading of the evidence has failed to convince us that he was in error.

The judgment is affirmed.

[No. 8727. Department One. January 7, 1911.]

THOMPSON-SPENCER COMPANY, *Respondent* v. O. A. THOMPSON *et al.*, *Appellants*.[1]

CORPORATIONS— ACTIONS—PARTIES— CAPACITY TO SUE — LICENSE FEE—WAIVER OF OBJECTION. The objection that a corporation could not maintain an action because it was not alleged or proved that it had paid its annual license fee under Rem. & Bal. Code, § 3715, is waived if not taken by answer or demurrer; or at least by specific objection to testimony on that ground, where the action was completely at issue before the passage of the act.

VENDOR AND PURCHASER—BONA FIDE PURCHASER. One taking a deed of land with notice that the grantor had no equitable interest therein, paying no present consideration, is not an innocent purchaser for value.

Appeal from a judgment of the superior court for Stevens county, Sullivan, J., entered November 3, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for an accounting. Affirmed.

O. C. Moore and *Martin & Wilson*, for appellants.

Hamblen & Gilbert and *Danson & Williams*, for respondent.

[1]Reported in 112 Pac. 655.

MOUNT, J.—This is the second appeal in this case. When it was here before the judgment was reversed, and the cause remanded for further proceedings. 49 Wash. 170, 94 Pac. 935. The facts are fully stated in the report of the former appeal, and need not be restated here. We there held that the facts proven were sufficient to afford relief to plaintiff in the action. Thereafter the cause was remanded, a new trial was had, and the trial court found in substance, that the land in question was the property of the plaintiff; that the appellant Martin took a quitclaim deed thereto from Thompson, with notice and knowledge that Thompson had no interest in the land and without any consideration except an antecedent debt past due. A decree was thereupon entered, removing the cloud by reason of the quitclaim deed from Thompson to Martin. The defendants have appealed from that decree, and argue that the trial court should have dismissed the action because the plaintiff is a domestic corporation, and the complaint did not allege, and the proof did not show, that the corporation had paid its annual license fee under Rem. & Bal. Code, § 3715.

The record shows that the action was begun in the year 1906, and was completely at issue prior to the passage of that statute. In *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031, we held that this objection must be taken either by demurrer or answer, and a failure to do so waived the question. The appellants in this case, at the close of plaintiff's evidence, moved the court to dismiss the action because "the evidence introduced does not show a right of recovery." But the ground now urged was not specifically mentioned. We think the appellants should have stated this ground so that the fact could have been supplied if the respondent could do so. The question, not having been raised, was waived.

The other questions argued are questions of fact. The evidence is amply sufficient to show that Mr. Thompson had sold the land to plaintiff, and received pay therefor, and had

no equitable interest in the land when he deeded it to Martin, and that the latter was advised and knew of all the facts. The evidence is sufficient to show, also, that no present consideration passed between Thompson and Martin, and Martin therefore was not an innocent purchaser for value.

The judgment was right, and must therefore be affirmed.

GOSE, PARKER, FULLERTON, and CHADWICK, JJ., concur.

[No. 8900. Department One. January 7, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE GRAY, *Appellant*.[1]

LARCENY—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a conviction for horse stealing, notwithstanding conflicting evidence establishing an alibi, where there was testimony that the horses were in the owner's pasture on May 4th, twenty miles southeast of W., that on May 4th at W. the accused obtained leave of A., the younger, to put four or five horses in the pasture of A. and his father, 12 miles north of W., that the accused and his brother were seen with the four young horses on the road to the pasture May 4th, 5th, or 6th, to which they added an old horse of accused's brother when near the pasture, and the accused notified the elder A. about noon on May 5th that he had turned five horses into the pasture with his son's consent, and the elder A. saw the four young horses there, freshly branded, with an older horse on May 9th, a note book in the accused's possession contained a memorandum evidently in his handwriting to the effect that he "Put four horses in pasture May the 5th, 1909," (the accused denying the writing of the memorandum), and that accused lived near the pasture where the animals were found until May 1st, when he went to work about three miles from the place from which the horses were stolen.

CRIMINAL LAW—TRIAL—INDORSEMENT OF NEW WITNESSES—APPEAL—HARMLESS ERROR. It is not prejudicial error to permit at the trial the endorsement of new witnesses for the state, where the defendant asked either a continuance or a subpoena for four witnesses, and thereupon the subpoena was issued and all the witnesses appeared in time to testify.

[1]Reported in 112 Pac. 641.

NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—CRIMINAL LAW. A new trial on the ground of newly discovered evidence is properly overruled where the evidence was cumulative or immaterial, or where it was to impeach the truth and veracity of a witness, witnesses for that purpose having been subpoenaed at the trial and not called for some reason not disclosed; or on the ground that a witness was intoxicated while on the stand, no objection having been made at the time.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered December 28, 1909, upon a trial and conviction of horse stealing. Affirmed.

Martin & Wilson, for appellant.

C. A. Pettijohn and *W. T. Warren*, for respondent.

PARKER, J.—The defendant was convicted in the superior court for Lincoln county of stealing four horses, and has appealed therefrom to this court. The principal contention of learned counsel for appellant is that the trial court erred in overruling their challenge to the sufficiency of the evidence to sustain the conviction, made by their motion for a directed verdict and by their motion to set aside the verdict. The evidence is in serious conflict as to the whereabouts of appellant at the time of, and for a few days following, the taking of the horses. There is no question as to the fact of the stealing of the horses by some one at about the time charged. It appears by the uncontradicted evidence of George Huck, owner of the horses, that he saw them in his pasture about twenty miles southeasterly from Wilbur, in Lincoln county, on the morning of May 4th, 1909, the day they are alleged to have been stolen; that he missed them a few days later, and found them in the Aldridge pasture, about twelve or fourteen miles northerly from Wilbur, on May 24th; that they had all been branded and one had been castrated since they were seen by him in his own pasture on May 4th.

The Aldridge pasture is conducted by a father and son, as a business in pasturing stock of others for hire. The son stays most of the time in Wilbur, having business there,

while the father had charge of the pasture, living near it, in May. The son testified that he saw appellant in Wilbur on May 4th, when appellant asked if he could put some horses in their pasture, and was told by the son to see his father at the pasture and it would be all right; that appellant then said he would put in four or five head, the son giving his assent; that on the following Sunday, May 9th, he visited his father and saw in the pasture four colts, all of which were freshly branded, and one was freshly castrated. Another witness named Warehime, who lives some ten miles northerly from Wilbur and about three miles from the Aldridge pasture, testified that he saw appellant pass his place on the morning of May 4th, 5th or 6th, with two other men, one being appellant's brother, all on horseback, driving four young horses in the direction of the Aldridge pasture; that they stopped at a pasture about a mile from Warehime's place, got another horse therefrom, and went on; that he could not identify this horse, but that the brother of appellant had a horse in that pasture; that four or five days later he saw the same four young horses in the Aldridge pasture; that they had all been lately branded, and one was freshly castrated. The elder Aldridge, who had charge of the pasture and lived near it, testified that appellant came to his home between 11 and 12 o'clock on May 5th, and said to him, "that he had turned some horses in the pasture, he had seen my son the day before and he told him it would be all right, yes, I told him that was all right;" that appellant said he had turned in four colts and one old horse, and asked to have them looked after; that on the Sunday following, May 9th, he saw four colts in the pasture that he had not seen there before, one being freshly castrated; that Mr. Huck, the owner, came and took the colts away twenty days later. There was introduced in evidence a small memorandum book, admitted to be the property of appellant and containing his signature. The book also contained this memorandum: "Put four horses in pasture May the 5, 1909."

There is a similarity of handwriting between the memorandum and the signature, though appellant positively denied writing the memorandum. The evidence shows without dispute that appellant lived at his sister's up to the latter part of April, in the neighborhood of Warehime's place, and that he went to work for a Mr. Woollen on May 1st, about three miles from the pasture where the owner of the horses last saw them.

This evidence, it seems to us, was sufficient to support the verdict, unless we can hold that the testimony of these witnesses as to appellant's whereabouts at the times stated was so conclusively refuted by the evidence of appellant and his witnesses, tending to show that he was not then at those places, that the minds of reasonable men could not differ upon that question. Appellant's witnesses did testify that he was at Woollen's place, or near there, working for him from May 2d to May 9th, and if those witnesses are to be believed their testimony accounts for his whereabouts during that entire week, and showed that he was not at the places testified to by the state's witnesses. There were a greater number of witnesses who so testified for appellant than there were for the state upon this subject. However, we see nothing lending greater weight to the testimony of defendant's witnesses than to that of the state's witnesses, save the mere fact that they were greater in number. The jury rendered their verdict after seeing and hearing all of the witnesses testify, and the learned trial judge had the same opportunity, which no doubt influenced his decision upon appellant's challenge to the sufficiency of the evidence.

The contentions of learned counsel for appellant that the evidence was insufficient to support the conviction, presents only the question of conflict in, and weight of, evidence. This cannot be determined by us as a matter of law, but must be left to the jury, the tribunal instituted by law to pass upon such questions. *State v. Manville*, 8 Wash. 523, 36 Pac. 470; *State v. Murphy*, 15 Wash. 98, 45 Pac. 729; *State*

v. Elswood, 15 Wash. 453, 46 Pac. 727; *State v. Maldonado*, 21 Wash. 653, 59 Pac. 489; *State v. Drusinman*, 34 Wash. 257, 75 Pac. 814; *State v. Hill*, 45 Wash. 694, 89 Pac. 160.

At the commencement of the trial the prosecuting attorney asked permission to endorse upon the information the name of the witness Warehime and three others as witnesses for the state. This was permitted by the court over the objection of counsel for appellant, and he then stated, "Now if the court please, since these names have been endorsed upon the information over our objection, we will either have to have a continuance or a subpoena for about four witnesses." The court thereupon permitted the issuing of subpoenas for five additional witnesses for the appellant, all of whom appeared in time to testify before the close of the trial. Under these circumstances the action of the court was not prejudicial error. *State v. Carpenter*, 56 Wash. 670, 106 Pac. 206.

In support of appellant's motion for a new trial, there were filed in his behalf several affidavits. Their purpose, apparently, was to support the motion in so far as it rested upon the grounds of accident and surprise and newly discovered evidence. Some of the affidavits tended to show that the witness Warehime made statements since the trial in which he admitted that he testified falsely against appellant upon the trial. The making of these statements was denied by him in a counter affidavit. Some of the affidavits tended to show that the witness Warehime could be impeached by the testimony of witnesses who did not testify at the trial, by showing his reputation as to truth and veracity. According to the statement of one of the attorneys for the appellant, some witnesses were subpoenaed and were present at the trial for the purpose of so impeaching the witness Warehime; but they do not appear to have testified upon that subject, and the reason thereof does not appear. Some of the affidavits tended to show that the witness Warehime was not at the place he said he was at the time testified to by

him, on or about the morning of May 5th, but at another place. This is denied by him in a counter affidavit, and besides, the time is not fixed with such certainty that renders it impossible for him to have been at both places. In an affidavit made by the younger Aldridge, he expresses the belief that he was mistaken as to seeing the appellant in Wilbur on May 4th and talking to him relative to the pasture, and that since refreshing his memory he believes it was on or about April 30th, and that he would so testify if again called upon the stand. Another affidavit is to the effect that the witness Warehime was intoxicated while on the witness stand. There is nothing else in the record so indicating. The learned trial judge saw and heard him testify, but there is nothing in the statement of facts showing that the trial judge certified to such fact. It, of course, was not a newly discovered fact. So it cannot be brought into the record by affidavit after trial, since it occurred, if at all, at the trial in the presence of the court. *State v. McGonigle*, 14 Wash. 594, 45 Pac. 20. Other facts are stated in these affidavits, but they are of less importance than those above noticed. We are of the opinion that the court did not abuse its discretion in denying the motion for a new trial, in so far as it was based upon these grounds.

Another ground of appellant's motion for a new trial was the alleged misconduct of the prosecuting attorney and his assistants. We are clearly of the opinion there was no such misconduct shown by the record in this regard as calls for the granting of a new trial. We deem it unnecessary to discuss this contention. We have carefully read all of the evidence, together with the affidavits in support of the motion for a new trial, and are unable to find any prejudicial error in the record. So far as appears thereby appellant had a fair trial, and we cannot disturb the verdict and judgment.

The judgment is affirmed.

RUDKIN, C. J., GOSE, MOUNT, and FULLERTON, JJ., concur.

[No. 9033. Department One. January 7, 1911.]

HOLT MANUFACTURING COMPANY, *Appellant*, v. H. C. ODENRIDER, *Respondent*.[1]

SALES—DEFENSES—RESCISSION BY VENDEE—WRITTEN CONTRACTS—VARYING BY PAROL—PRINCIPAL AND AGENT—AUTHORITY OF AGENT. Upon a sale by agents of a harvester under a written contract providing that the purchaser was not to countermand the order except for failure of crops, and that all stipulations entered into are all embodied in the contract and that no agent has any power to make additions or vary the terms, it is not competent for the purchaser to set up a contemporaneous agreement with the agents to the effect that the contract of sale was not delivered or to become effective for one month, and that the owner could, and did, cancel the same within such time; since the written contract could not be contradicted by parol.

SALES—DEFENSES—CANCELLATION—COUNTERMAND OF ORDER—PLEADING—ISSUES AND PROOF. In an action for the price of a harvester sold by agents, an affirmative defense of a contemporaneous oral agreement, contradicting the writing, to the effect that the contract was not to be effective for one month and that pursuant thereto it was cancelled by the purchaser, does not admit of proof, over defendant's objection, that the written contract was cancelled by mutual consent.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered November 23, 1909, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Reversed.

Hamblen & Gilbert, for appellant.

Martin & Wilson, for respondent.

GOSE, J.—On the 22d day of April, 1908, the defendant gave the plaintiff a written order directing it to manufacture a combined harvester and ship it to him at Almira Station, in this state. The order stipulated that the defendant "agrees not to countermand this order except for failure of crops prior to the date of shipment, . . . and it is understood

[1]Reported in 112 Pac. 670.

and agreed that all stipulations, agreements, and warranties entered into between the respective parties are embodied in this contract, and no agent has any power to make any additions to or to vary the terms and conditions hereof." The machine was manufactured and shipped to the defendant at the point designated. Upon his refusal to pay for the machine as provided in the order, this suit was commenced. The complaint alleges, so far as material to the questions raised by the appeal, the sale and delivery of the machine, and the defendant's promise and refusal to pay for it. The answer denies the sale and delivery, denies that any sum is due, and alleges affirmatively:

"For further and separate defense, defendant alleges that on or about the 22d of April, 1908, he entered into negotiations with one E. R. Gordon and one Pew, who represented themselves to be agents of the plaintiffs in this action, and that then and there he entered into a contract for the purchase of one Holley Junior Combined Harvester, with the express understanding and agreement with the said Pew and said Gordon that said contract was not to be completed nor deemed in effect nor become effective or delivered to the Holt Manufacturing Company, for at least one month, and that he was to have the right at any time within the month to recall said contract from the hands of said Pew and Gordon and cancel the same. That afterwards, within two weeks from the said 22d day of April, the said defendant did notify said Pew and Gordon that he did not desire to continue said contract and he therefore desired the same destroyed and cancelled, to all of which the said Pew and Gordon agreed, and then and there the said Pew began negotiations for the sale, to said defendant, of a McCormick Header, instead of the Combined Harvester. That thereafter this defendant purchased a Best Combine and that as soon as the plaintiffs discovered that he had purchased the 'Best' they then shipped and consigned to him a secondhand Holley Junior Machine from Walla Walla, Washington, and that said secondhand machine did not arrive at Almira until the 14th day of July, 1908, or about three months after said contract had been cancelled and revoked. That this defendant never received

said machine, never had anything to do with it, never accepted it and it has never been in his possession."

This averment was denied by the reply. From a verdict and judgment for the defendant, the plaintiff has appealed. The evidence is undisputed that the appellant delivered a new machine.

It is apparent that the new matter pleaded is not a defense, and that it does not raise an issue. The order expressly provides that all the contemporaneous stipulations between the parties are merged into the contract, and that no agent has the power to vary its terms. This would follow if the order did not so provide. Otherwise a written order or contract would be a useless formality and precaution. The object to be accomplished by a written agreement is that it may furnish the evidence of what the contract is. The very purpose of the averment was to contradict the terms of the written contract, and to prove a contract materially different from the written order. Respondent reserved the right to countermand the order for a failure of crops prior to the date of shipment. He does not plead that he exercised this right. The court refused to admit evidence offered in support of the new matter in the answer, but did, over the appellant's objection, admit proof that the contract was cancelled before the machine was shipped, by the mutual agreement of the parties to the suit. If the respondent countermanded the order before the machine was shipped, on account of the failure of crops, or if the contract was cancelled by mutual agreement, such matter was an affirmative defense, and should have been pleaded in the answer. *Denny v. Stout*, 59 Neb. 731, 82 N. W. 18; *Grunwald v. Freese* (Cal.), 34 Pac. 73; *Koons v. St. Louis Car Co.*, 203 Mo. 227, 101 S. W. 49; *Taussig v. Southern Mill & Land Co.*, 124 Mo. App. 209, 101 S. W. 602; *Roberts v. Pacific & A. R. & Nav. Co.*, 121 Fed. 785.

While the appellant's objections were not as full and specific as they might have been, we think they served to

challenge the attention of the court and counsel to the fact that the evidence was not within the issues. The court instructed the jury that the order was a valid and binding contract and "continued at all times thereafter to be a legal contract, unless you find that the same was cancelled by the parties," and that, "If you find that the parties, the plaintiff and the defendant, for any reason agreed and consented to the cancellation of said contract it would thereafter cease to be a valid and binding contract on the part of either plaintiff or defendant, and that these are questions for the jury to determine from the evidence in the case." This instruction was excepted to, on the ground that it presented a question to the jury not within the issues. The appellant in due time moved for a judgment notwithstanding the verdict, and for new trial. The motion for new trial was based upon the several statutory grounds. A litigant prepares his case for trial in the light of the issues. It is obvious that the appellant was not prepared to meet an entirely new issue and one not remotely suggested by the answer. The motion for a new trial should have been granted.

Evidence was admitted which, under a proper issue, would have warranted the jury in finding, either that the right reserved in the order to countermand was exercised, or that the parties agreed to cancel it. The judgment is reversed, with directions to the trial court to permit an amendment to the answer, if applied for within thirty days after filing the remittitur in the court below. Otherwise to enter a judgment upon the pleadings in favor of the appellant.

Rudkin, C. J., Parker, and Mount, JJ., concur.

[No. 8949. Department Two. January 7, 1911.]

J. W. COFFER, *Respondent*, v. C. J. ERICKSON, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—INJURY TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE. It is not contributory negligence, at a matter of law, for plaintiff to walk across a narrow foot bridge especially built for foot passengers, under which was a work train the locomotive of which was throwing up sparks and cinders, one of which lodged in plaintiff's eye (MORRIS and CHADWICK, JJ., dissenting).

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE OF CONTRACTOR—INJURY TO PEDESTRIAN. It is negligence, warranting a recovery for the loss of an eye by a pedestrian by reason of a cinder, for a contractor on a city street to operate a locomotive without sufficient spark arresters, under a narrow bridge designed for foot passengers.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—RELEVANCY. In an action for the loss of an eye through the lodgment of a cinder, it is not prejudicial error to exclude evidence of experts as to the frequency of a loathsome disease, the effect of which might have been a disease of the eye, resulting in its loss, where it was shown that the eye was treated for such disease and the expert was allowed to go into the history of the germ and explain the manner of its detection, as his testimony was not restricted.

APPEAL—HARMLESS ERROR—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. An instruction upon the subject of contributory negligence is not prejudicial error in stating that the plaintiff must not "blindly and heedlessly rush into a place of danger," when, as coupled with other correct instructions, the jury could not have been misled.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE—DISCRETION. It is not an abuse of discretion to refuse a new trial for newly discovered evidence, where it appears that such evidence was disclosed early in the trial, no continuance was asked, or effort made to learn of the whereabouts of the witness, and from the circumstances the trial judge was warranted in finding that due diligence had not been exercised in the first instance.

Appeal from a judgment of the superior court for King county, Ronald J., entered February 7, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages sustained through the loss of an eye. Affirmed.

[1]Reported in 112 Pac. 643.

Peters & Powell, for appellant.

H. E. Foster, for respondent.

DUNBAR, J.—The appellant, Erickson, was under a contract with the city of Seattle for the regrade of Fourth avenue from Yesler Way north to Pike street. Fourth avenue runs northerly and southerly, and is crossed by Columbia street, running easterly and westerly. At the intersection of Columbia street and Fourth avenue, Fourth avenue had been cut down about thirteen feet, and in order to permit the going and coming of foot passengers upon Columbia street across Fourth avenue, the city had authorized the appellant to construct a wooden bridge, extending along the north side of Columbia street from the east side of Fourth avenue to the west side, spanning the entire Fourth avenue. The bridge was sixty-eight feet long, the main part of it six feet wide, with extending floors three feet on each side, making the entire width of the bridge, so far as protection from anything below was concerned, about twelve feet. The appellant, at the time of this accident, which was in September, 1908, had laid down two tracks upon which he operated trains of dump cars drawn by small locomotive engines, to carry the dirt from the northern portion of the work southerly, and the east trains passed to and fro under this foot bridge. The respondent was a timber cruiser and had lived in that neighborhood for about a year. On the first of September, 1908, while walking down Columbia street he stepped upon this bridge, and while going across it, one of the appellant's engines carrying some empty dirt cars passed under the bridge and, according to respondent's complaint, puffed up or threw up on top of the bridge a cloud of cinders, one of which was thrown into respondent's eye, with the effect that, after a long treatment, the eye was lost; and this action is brought for damages for said loss.

The material allegation in the complaint, upon which the issues were tried, was, in substance, as follows: That while

plaintiff was upon the overhead bridge and attempting to cross said Fourth avenue, the defendant, his agents and servants wrongfully and without right, had, standing upon said public street and near said overhead bridge, a work train propelled by a steam locomotive, which steam locomotive was not equipped so as to protect pedestrians and others from injuries by reason of its operation, the same not being equipped with what are known as spark arresters; and while plaintiff was upon said overhead bridge the defendant, his agents and servants, wrongfully and without right, suddenly and without notice or warning, started said work train forward, with great force and energy, and the same not then and there being equipped with appliances to prevent it from throwing particles and cinders, a particle, cinder, or other substance was, on account of the careless and negligent manner in which the locomotive was kept and operated and started, and on account of the lack of proper equipment in the way of arresters, thrown with great force and power from said locomotive into plaintiff's right eye, thereby and instantly causing the plaintiff great pain and suffering, and which cinder or particle so thrown in his eye embedded itself therein, and the same became so serious that, before the particle could be removed, it so damaged and injured plaintiff's eye that said eye became totally destroyed.

It was admitted by the appellant that he did not have the ordinary or technical spark arresters on the engines which he operated, but it was claimed that they had other devices which were equally effective. The effectiveness of these devices was a question which, under conflicting testimony, was submitted to the jury; its verdict shows that it was decided in favor of respondent's contention, and that question we will not further discuss. At the close of the respondent's testimony, motion for a nonsuit was made; also motion for an instructed verdict, and upon the conclusion of the entire case, a demurrer to the evidence; the denial of all of which is alleged as error.

The main contention of the appellant is that the respondent had failed to show any negligence on the part of the appellant, and that he had shown by his own testimony contributory negligence. It is urged that it was contributory negligence for a man forty years of age, a timber cruiser, who had lived for six years in the city of Seattle and for one year prior to the accident continuously within a block of where the accident occurred, and who had observed daily the manner of operating the trains, to step upon this bridge when he was cognizant of the fact that the engines were passing and were liable to pass under it. Several cases from this court are cited to sustain this contention, the first of which is *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997. In that case it was held that a traveler who drives a team upon a railroad crossing, at a point where for considerable distance he had an unobstructed view of an approaching locomotive, is guilty of contributory negligence as a matter of law, where he drives onto the crossing either without looking, or looks and whips up his horses in an endeavor to cross ahead of the engine. The other cases cited —*Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830, and *Davis v. Coeur d'Alene & S. R. Co.*, 47 Wash. 301, 91 Pac. 839, are all of the same character, and based on the doctrine announced in *Woolf v. Washington R. & Nav. Co.*, *supra*. But these cases can be readily distinguished from the case under consideration, for there it was a foregone conclusion that, if the parties injured drove or walked onto railroad tracks when cars were close to them, as shown by the testimony in those cases, there was no probability of their escaping instant death or serious damage. But in this case there is no such impending or apparent danger shown, for a person might walk over this foot bridge many times and escape serious consequences. The appellant, in his argument to show that he was not guilty of negligence, says:

"But even if there had been competent proof that there

were no spark arresters on the defendant's engines or that the injury to plaintiff's eye resulted from a defect in such, still the injury and extent of it was an occurrence so unusual in human experience as not to constitute negligence on the part of the defendant;"

citing cases to sustain this doctrine.

Again, it is said:

"When the act and injury are not known by common experience to be naturally and usually in sequence, and the injury does not, according to the ordinary course of events, follow from the act, then the act and the injury are not sufficiently connected to make the act the proximate cause of the injury."

If this is true, it must necessarily follow that the peril was not sufficiently apparent to constitute negligence on the part of the party who was walking across the bridge. It must be borne in mind that this was a bridge built for the special use of foot passengers, and that the respondent had a right to walk and cross this bridge in the absence of any apparent danger. So that the vital question in this case is, do the circumstances under which these engines were operated, taking into consideration their construction with reference to preventing sparks from flying, show negligence on the part of the appellant? The same test of negligence could not be applied to the passenger as would be applied to the operator of the engines, for it was his duty to look out for the safety of foot travelers, and to investigate and determine what character of cars and what manner of operation of said cars would inure to the safety of the traveling public. But, as we have said, we think there was sufficient on this question of negligence to be passed to the consideration of the jury.

There was an attempt on the part of the appellant to prove that the cause of the loss of the eye was not attributable to a cinder from appellant's engine, but was caused by what is technically termed gonorrheal ophthalmia, the effect of a loathsome disease, and he introduced Dr. R. W. Perry, who

was asked to describe this loathsome disease, and did so. He was then asked the question: "Do you frequently meet it in your experience in the practice of your profession?" This question was objected to as immaterial, the objection was sustained, and this is alleged as error by the appellant. The court said:

"That would be competent testimony for you if you can show any probability or likelihood, or if you are going to follow it up by showing that this man had gonorrhea, and that it could have come in contact with his eye in such manner as the doctor testifies infection could take place;"

but held, as we think properly, that it was immaterial under the circumstances proven.

Dr. Burns, who had treated the eye, had testified that he had treated it as gonorrhea ophthalmia, and Dr. Perry was then allowed, after this objection was sustained, to go into the history distinguishing germ of the disease, which he described as the diplo-coccus of nesla, over the objection of the respondent. He was then asked "if, upon a microscopic examination of a smear from the discharge, an oculist should discover the presence of this diplo-coccus, what would he be likely to assume as the cause of this pus discharge, as well as to surmise;" and answered that, "if he found the diplo-coccus of gonorrhea or nesla, he might say definitely that was the cause of the trouble in his eye—of the discharge;" and much more to the same effect. So that we think that the testimony of Dr. Burns was not restricted, and that the mere fact that this disease might have been frequently found in his experience in the practice of his profession as an oculist was not material, for it was conceded that it was a disease pertaining to the eye.

It is also contended that the court erred in instructing the jury, in relation to the alleged contributory negligence of respondent, as follows:

"He must not blindly and heedlessly rush into a place where danger is likely to be apprehended. If plaintiff met

this requirement he cannot be charged with contributory negligence. If he fell short of this requirement, and if his negligence in this respect, contributed to and was a proximate cause of his injury, then he cannot recover."

Objection is made to the language "blindly and heedlessly rush into a place where danger is likely to be apprehended." This may not be the most fortunate expression that the court could have used, but no two judges express themselves exactly alike, and when the whole instruction in this respect is considered, we think that the jury were not in any way misled. On this branch of the subject the court said:

"Pedestrians had a right to cross said overhead bridge, but the law requires that a pedestrian in crossing a street which is being improved, or wherein work is being carried on, must act as a person of ordinary prudence, care and caution, with the knowledge and experience of such pedestrian, would act under similar circumstances. He must not blindly," etc.

It will not be presumed that the jury seized on two or three words in an instruction and lost sight of the sense of the instruction as a whole, where it was as plainly stated as it was in the instruction in this case. The instruction throughout, both as to the duties and liabilities of the appellant and the corresponding care demanded of the respondent, are full and fair, and we are satisfied that the jury were in no way misled by them.

It is also assigned that the court erred in not granting the appellant a new trial on the ground of newly discovered evidence. The application for new trial was based on the affidavit of John J. Jamison, a clerk in the office of the attorneys for the appellant, who swears that, as such clerk, he had sole charge of the investigation of the facts constituting a defense, and of the securing of witnesses and the preparation of the trial for the appellant; that effort had been made to obtain the names of the nurses at the hospital at the time of respondent's sojourn there, which had failed; that the nurse Anna Bonen had testified that, in irrigating

the eye of the respondent, a cinder, about a quarter of an inch long, had been washed therefrom into the receiving basin, and that this cinder had been discovered by, and examined by, Sister Crescent, who was the chief nurse; that the existence of Sister Crescent was not known to the appellant prior to the time of this testimony, and that immediate steps were taken to obtain the testimony of said Sister Crescent, who was found to be in Colfax, Washington; that an affidavit had been obtained from her which, in effect, disputed the testimony of Miss Bonen in relation to the cinder, and that on account of this newly discovered evidence, a new trial should be granted. But this testimony was adduced early in the case. Counsel had notice on the 2d of February, by the testimony of the nurse Miss Bonen, that Sister Crescent was present when the particle was washed from the eye into the basin, and that Sister Crescent picked up the particle and examined it, and afterwards lost it. It also appears from the testimony of Dr. Burns, early in the case, that, while he was attending the respondent at the hospital, he was advised that this substance had been washed from the eye.

The granting of a new trial on the ground of newly discovered evidence is a question necessarily so largely in the discretion of the trial judge that it must appear with reasonable certainty that such discretion has been abused to the prejudice of the appellant, before the appellate court will substitute its judgment for that of the presiding judge, who has observed the proceeding throughout the trial. In this case, the judge might reasonably have concluded that due diligence had not been exercised by appellant's attorneys. The attending physician, Dr. Burns, indicated by his testimony that he was at least friendly to the defense. A consultation with him would, no doubt, have disclosed who the nurses were who attended on respondent while in the hospital, and it would seem, in a case of this kind, that due diligence would have required the ascertainment of that fact.

Nor did it seem to have been any secret, for it readily developed in the trial, by the testimony of the nurse Miss Bonen and Sister Arthur, that Sister Crescent was the chief nurse during respondent's stay at the hospital. These were circumstances which the court might reasonably take into consideration, in connection with the claim of the clerk that he had been unable to ascertain who the nurses were. In addition to this, the appellant was informed of this transaction and of the fact that Sister Crescent witnessed it, in the early stage of the trial, viz., on February 2, and the trial was extended over February 4; and notwithstanding the fact that the affidavit sets forth "that the town of Colfax is about three hundred and fifty miles or more from the city of Seattle, and that it was utterly impossible to obtain an interview with, or the attendance of, Sister Crescent at said trial," no motion was made for a continuance and no suggestion of surprise. After having knowledge of the facts complained of, the appellant offered his testimony and, at the close thereof, formally rested his case. He should not be permitted to submit his case on one set of facts and, if a verdict is found against him, obtain another trial on another set of facts which were known to him at the time of such submission. Such has been the uniform holding of this court where no continuance was asked for. *Pincus v. Puget Sound Brewing Co.*, 18 Wash. 108, 50 Pac. 930; *Woods v. Globe Nav. Co.*, 40 Wash. 376, 82 Pac. 401; *Reeder v. Traders' Nat. Bank of Spokane*, 28 Wash. 139, 68 Pac. 461.

Considering the whole case, we see no reason for disturbing the judgment. It is therefore affirmed.

RUDKIN, C. J., and CROW, J., concur.

MORRIS, J. (dissenting)—I dissent. The evidence to my mind clearly establishes the contributory negligence of the respondent. He had lived within a block of the place where he claims to have received his injury, for a year, crossing the bridge daily. He knew the engines discharged quanti-

ties of smoke and cinders, while they were passing under the bridge. He noticed it frequently. He says the bridge "was literally covered there at times, I noticed," and that he never passed there without observing cinders being thrown out with great force. As he saw an engine going south, he hesitated because, he says, he did not want to get in the way of the smoke. Evidently he appreciated the probability of cinders being thrown upon him if he crossed over the engine. Then he proceeded on his way and saw the north-bound engine approaching the bridge "puffing up sparks." He does not hesitate this time, however, but walks upon the bridge directly over this engine and right into the cloud of smoke, cinders and sparks he saw being ejected from its smokestack. He deliberately, and without any necessity for so doing, placed himself in a position where the cinders and sparks from the engine must strike him. To do so was to voluntarily risk any danger that might arise from such a position, and was contributory negligence.

If the majority hold it was negligence for the engine to pass under the bridge puffing out cinders, how can we escape the conclusion that it was likewise negligent for the respondent to deliberately walk into the cinders? He cannot be heard to say that, while he knew sparks and cinders would be thrown up against and about him, he did not anticipate any serious danger. As we said in *Nordstrom v. Spokane & Inland Empire R. Co.*, 55 Wash. 521, 104 Pac. 809, 25 L. R. A (N. S.) 364, that "is a plea of knowledge of the danger, but not of its consequences, a doctrine which the law does not recognize . . . knowledge of danger is in law knowledge of the injurious results naturally and proximately flowing from that danger." I cannot escape the conclusion that this principle of law is applicable to the facts here disclosed, and that respondent's knowledge of the ejecting sparks and cinders being thrown with force upon and over the bridge, his voluntary walking into them with full knowledge of them, seeing them being so ejected, was a knowledge of the danger,

and in law a "knowledge of the injurious results naturally and proximately flowing from that danger."

The appellant's motion for instructed verdict should have been granted.

CHADWICK, J., concurs with MORRIS, J.

[No. 8781. Department Two. January 7, 1911.]

E. S. JORDAN, *Respondent*, v. PATRICK WELCH *et al.*, *Appellants*.[1]

FIRES—ACTIONS—DEFENSES—RAILROADS—RIGHT OF WAY—DEEDS—WAIVER OF DAMAGES. A waiver of damages in a right of way deed, for loss sustained by reason of the location, construction and operation of a railroad thereon, does not preclude recovery for loss by reason of a fire carelessly set out on the right of way by the contractors constructing the road.

ASSIGNMENTS—ACTION IN TORT—SURVIVAL—DAMAGES FROM FIRE. A right of action for damages caused by a fire negligently set out, survives to the personal representative, and is therefore assignable.

FIRES—NEGLIGENCE—RAILROAD CONTRACTORS—DUTY. It is actionable negligence for railroad contractors in construction work to deposit sparks or live coals, from an engine operating a steam shovel, upon the right of way, and allow the fire to spread to an adjoining meadow, during the dry season when the soil was easily ignited, irrespective of any negligence in operating the engine; since it was their duty to take precautions against the communication of the fire to adjoining lands.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 3, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages to property by fire. Affirmed.

Robertson & Miller and *Harry Rosenhaupt*, for appellants.

Charles P. Lund, for respondent.

[1]Reported in 112 Pac. 656.

MORRIS, J.—Respondent brought this action to recover damages for injuries to property occasioned by a fire, alleged to have been started by appellants and by them permitted to escape to respondent's lands. Appellants are railroad contractors, and were engaged in constructing the right of way of the Spokane, Portland & Seattle Railway Company through respondent's lands, near Cheney. This right of way had been purchased by the railway company, and appellants were engaged in making a deep cut through what had formerly been a meadow. The loose material blasted into the cut was being elevated by a steam shovel into a skip attached to a derrick, the beam of which swung the skip around and deposited the material upon the right of way. The engine operating this derrick was placed on the bank of the cut, and is alleged to have been so operated as to emit and discharge large quantities of sparks, cinders and live coals, upon the right of way, which igniting, a fire was permitted to burn until it had been communicated to respondent's adjoining meadow. The negligence complained of was in discharging the fire upon the right of way in the dry grass and combustible material, and in not preventing its escape onto respondent's land.

Seven causes of action were set forth: (1) The destruction of the meadow, including as a special item a road leading from the farm to Cheney; (2) the value of the use of teams in seeking to control the fire; (3) damage to four horses burned in the fire; (4) damages for cutting trees and fences; (5) damages caused by rocks thrown by the blasting through the roof of respondent's barn; (6) damages for loss of time to respondent and his employees in seeking shelter from the frequent blasts; and (7) an assigned claim of damage to the lands of John Taylor, burned in the same fire. The jury returned a separate verdict upon each cause of action, aggregating $2,636, and defendants appeal. A number of errors are assigned, but they will all be disposed of, in so far as they merit attention, in the discussion of three.

The right of way deed from respondent to the railway

company contained a waiver of all damage sustained by reason of the location, construction and operation of the road. Appellants sought to use this waiver as a defense. The court, however, refused to so regard it. We see no error in so holding. The waiver could not be broader than its terms, and would only cover such damage or injury as would naturally flow from the ordinary and proper method of construction and operation. Such a waiver would not destroy any right of action growing not out of the ordinary happening of events in the construction and operation of the road, but based upon specific acts of carelessness and negligence not necessary nor usual in the construction and operation of the road. *McMinn v. Pittsburg M. & Y. R. Co.*, 147 Pa. St. 5, 23 Atl. 325.

The second contention is that the Taylor claim for damages was not assignable, as it rested in tort. The rule governing assignments of causes of action was early determined in this state in *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. 948, where it was held, following the New York rule as established in *Zabriskie v. Smith*, 13 N. Y. 322, and *Byxbie v. Wood*, 24 N. Y. 607, that the true test of whether or not an action was assignable was whether or not it survived, using this language:

"We think it may be fairly said that, by a great preponderance of authority mere personal torts which die with the party, and do not survive to the personal representatives, are not capable of passing by assignment, and, conversely, that a cause of action which *does* survive to the personal representative can be enforced in the name of the assignee."

It would hardly be contended that the cause of action for damage to the Taylor lands did not survive. It was, therefore, a proper assignment, and it was not error to so hold. In addition to the *Slauson* case, we held, in *Weed v. Foster*, 58 Wash. 675, 109 Pac. 123, that an assignment of a recovery or part of a recovery in tort was an enforceable contract.

The next and main contention is that appellants cannot be liable in the absence of proof that the fire was caused by their negligence, asserting there is no proof that the engine was defective in any manner, or that it was negligently operated, or that the appellants were negligent in permitting combustible material to accumulate upon the right of way. The charge of negligence was discharging the live coals upon the dry grass of the right of way, and in not preventing the fire from escaping from the right of way to respondent's lands. This negligence in no way involved any defect in the engine, or any negligent manner of operation, except as the jury might have held that discharging live coals upon the right of way under the circumstances was "negligent operation." The engine might have been in the best possible condition, and yet have been so used as to discharge the fire, and as there was evidence to justify the jury in holding that the fire originated from the engine, such evidence would sustain the charge of negligence made. Thompson on Negligence, § 2277, says:

"The circumstances may be such that the mere act of setting the fire will involve such obvious danger to adjoining property as affords of itself evidence of negligence."

The season was dry, the fire was in August, the right of way and the respondent's meadow were dry and easily ignited. The soil itself burned easily and, when once ignited, would burn below the surface until moisture was reached. Under such circumstances it was the duty of appellants to take precaution against the communicating of any fire to the right of way, or its spread to adjoining lands. The engine may have been perfect in all its parts, the engineer may have been the best obtainable, and the operation of the engine mechanically correct; yet, if under such circumstances as here detailed, appellants permitted sparks or live coals to ignite the combustible material upon the right of way and thence to communicate itself to respondent's meadow, they must answer for the damage.

The case nearest in point cited in the briefs is *Louisville, etc. R. Co. v. Nitsche*, 126 Ind. 229, 26 N. E. 51, 22 Am. St. 582, 9 L. R. A. 750, where it was held that the railroad company was liable for negligently suffering a fire upon its right of way to escape and injure adjacent peat or turf lands, where on account of the dry season and the combustible character of the material, it was reasonably certain that the fire would escape through the peat into the adjoining lands, and that it was no defense that the railroad company was lawfully using the fire upon its own right of way, saying:

"A lawful act may be done in such a mode, or under such circumstances, as to make it wrongful, and where fire is used in an improper manner, or under circumstances such as inexcusably imperil surrounding, or adjacent property, the person so using it is a wrongdoer."

Such is a statutory rule in this state, under Rem. & Bal. Code, § 5141:

"If any person shall for any lawful purpose kindle a fire upon his own land, he shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property, as a prudent and careful man would do, and if he fail so to do he shall be liable in an action to any person suffering damage to the full amount of such damage."

While this statute has no special controlling force here, as this action is not within its terms, it is indicative of the declared policy of this state in requiring care and caution in handling and controlling such a destructive agency.

Finding no error, the judgment is affirmed.

RUDKIN, C. J., CROW, and DUNBAR, JJ., concur.

[No. 9072. Department Two. January 7, 1911.]

MILDRED SIMONS, *Respondent*, v. JOHN A. WILSON, *Appellant*.[1]

TRESPASS—CUTTING TREES—TREBLE DAMAGES—MUNICIPAL CORPORATIONS—STREETS—OWNERSHIP OF FEE. Rem. & Bal. Code, § 939, giving treble damages for the cutting of any trees upon any city lot or upon any highway in front of the same, the owner of city lots may recover treble damages for the cutting of trees in an abutting street and alley, whether as owner of the lots or as owner of the fee in the street; since the fee to the street rests in the owner of the abutting property.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 3, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for trespass. Affirmed.

C. C. Upton, for appellant.

D. W. Henley, for respondent.

MORRIS, J.—Respondent is the owner of lots in Cannon Hill addition to Spokane, which are unimproved and unoccupied. In the street abutting on the north of said lots and in the alley at the rear, a number of pine trees were growing. Between the north lot line and the south curb line of the street, the trees were from six to twelve inches in diameter. Those in the alley were somewhat smaller. In March, 1909, appellant, without any authority or permission so to do, and for no apparent purpose so far as we can ascertain from the record, cut these trees down and carried them away. Thereupon respondent commenced this action under Rem. & Bal. Code, § 939, providing:

"Whenever any person shall cut down, girdle, or otherwise injure or carry off any tree, timber, or shrub on the land of another person, or on the street or highway in front of any

[1]Reported in 112 Pac. 653.

person's house, village, town, or city lot, or cultivated ground, or on the common or public grounds of any village, town, or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city, against the person committing such trespasses, or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor."

Upon the trial the court found for respondent, and assessed the damage at the sum of $100, which, as provided in the statute, was trebled, and judgment given for $300, from which defendant appeals.

The contention of appellant here is that respondent has no right of action, not being the owner of the land upon which the trees were growing when cut, and that the section quoted simply provides the measure of damage in cases where the right of action exists independent of the statute. He also suggests that the lot owner has no title to any portion of the abutting street. It seems clear that, irrespective of whether the fee to the streets is in the municipality or the abutting lot owners, a right of action is given by this statute to the lot owner, against any person cutting down the trees growing on the street adjacent to such lot. The statute can have no meaning unless it be a recognition of the right of action for trespass resting in either the municipality or lot owner. It could avail appellant nothing if the right of action was not conferred by the statute, since such right undoubtedly exists irrespective of the statute. This court has uniformly held, whenever the question has been suggested, that the fee to the street rests in the owner of the abutting property. *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 Pac. 362; *Seattle v. Seattle Elec. Co.*, 48 Wash. 599, 94 Pac. 194, 15 L. R. A. (N. S.) 486; *In re Third Avenue*, 54 Wash. 460, 103 Pac. 807; *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988. Under such a holding, an undoubted right of action rested in the respondent. So that it is immaterial whether the right exists by virtue of the fee to the street resting in

respondent, or simply by reason of the statute irrespective of the fee.

Such being the case, the judgment is affirmed.

RUDKIN, C. J., CHADWICK, CROW, and DUNBAR, JJ., concur.

[No. 9152. Department Two. January 7, 1911.]

PACIFIC COAST PIPE COMPANY, *Appellant*, v. DANIEL HEDICAN *et al.*, *Respondents*.[1]

QUIETING TITLE—CLOUD—MORTGAGE BY STRANGER. Under Rem. & Bal. Code, § 809, enlarging equity jurisdiction, an action lies to quiet title against a mortgage given by a stranger to the title.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered November 22, 1909, upon sustaining a demurrer to the complaint, dismissing an action to quiet title. Reversed.

P. C. Shine, for appellant.

McWilliams & McWilliams, for respondents.

MORRIS, J.—The only question involved in this appeal is whether or not the complaint, the action being one to quiet title, states a cause of action. The court below, having sustained a demurrer, dismissed the action upon appellant's refusal to further plead, and from such judgment this appeal is taken.

The complaint recites that the plaintiff is now the owner, and for a long time has been in possession, of the land; that defendants claim and assert an interest therein adverse to the plaintiff, which claim is without right, neither of the defendants having any right, title, interest or estate in the land; that Thomas Hedican, one of the defendants, for the purpose of defrauding the plaintiff, and acting under a power of attorney from Daniel Hedican, executed for the purpose of

[1]Reported in 112 Pac. 655.

defrauding plaintiff, did on March 12, 1909, enter into a conspiracy with defendant Bolton, who is the alleged husband of the undivorced wife of Daniel Hedican who is wrongfully supposed to be deceased, to and did execute a mortgage upon the land to said Bolton, without any consideration, which said mortgage was placed on record and purports upon its face to be a lien upon the land; that under the belief that Daniel Hedican was dead, an administrator has been appointed for his estate, which said administrator and the wife of Daniel Hedican claim an interest in the land because of said wrongful alleged death.

The ground upon which the demurrer was sustained, as we gather from the briefs, is that the complaint did not show any such interest in the property as to require the intervention of a court of equity, and even if such interest be shown, the alleged cloud is not of such substantial nature as to justify an action to remove it; the argument being that the mortgage is shown to have been executed by a stranger to the title, and that the complaint alleging that plaintiff is *now* the owner of the property, it does not appear that it was the owner or had any interest in the property when the mortgage was given. Nor does it appear that Daniel Hedican was not the owner at the time of the giving of the mortgage.

It may be admitted that many states hold that, in order to constitute a cloud upon title, the alleged offending instrument must upon its face confer some right or interest in the land, and that it could not show such interest if executed by a stranger to the title. Such, however, is not the rule in this state; actions of this character being permitted, even though the claim be shown to be absolutely invalid, upon the theory that Rem. & Bal. Code, § 809, has enlarged equity jurisdiction in cases of this character, and under this section the action may now be brought by the person in possession "for the purpose of stopping the mouth of a person who has asserted

or who is asserting a claim to the plaintiff's property. It is not aimed at a particular piece of evidence, but at the pretensions of the individual," and "it is sufficient that the party in possession is incommoded or damnified by the assertion of some claim or interest in the property adverse to him." *McGuinness v. Hargiss*, 56 Wash. 162, 105 Pac. 233, and cases there cited. Under the above rule, this complaint stated a cause of action, and it was error for the court to sustain the demurrer and enter a judgment of dismissal.

The judgment is reversed, and the cause remanded for further proceedings.

RUDKIN, C. J., CHADWICK, and DUNBAR, JJ., concur.

[No. 8981. Department Two. January 7, 1911.]

CHARLES H. BAKER, *Appellant*, v. SEATTLE-TACOMA POWER COMPANY *et al.*, *Respondents*.[1]

CORPORATIONS—STOCKHOLDERS—DEALINGS WITH CORPORATION—PROFITS MADE. Where the continued existence of a corporation requires the purchase of a competing business, a syndicate consisting of officers and a majority of the stockholders of the corporation may, after full disclosure of all the facts, acquire the property and resell it to the corporation at a profit to themselves, and are not within the rule preventing officers of a corporation from dealing in property of the corporation (CHADWICK, J., dissenting).

SAME—ACTION BY STOCKHOLDER—WAIVER OF OBJECTIONS—ESTOPPEL. A minority stockholder is estopped from maintaining a suit to compel a syndicate, consisting of officers and a majority of the stockholders, to pay to the corporation a profit realized by them in the purchase of a competing business, to save the life of the corporation, and a resale by them to the corporation at a profit, where such minority holder, after objecting to the sale, made a written waiver of his objections and ratified the sale, in order that certain bonds of the corporation could be sold (CHADWICK, J., dissenting).

SAME—MEETINGS—VOTING BY PROXY. A stockholder's proxy clothes the proxy holder with full power to represent such portions of the stock, and binds the absent owner, in the absence of fraud.

[1]Reported in 112 Pac. 647.

CORPORATIONS—STOCKHOLDERS—ACTIONS BETWEEN—ALLOWANCE OF ATTORNEY'S FEES. Where, in an action by a stockholder to recover from officers and other stockholders a profit realized by them in dealings between themselves and the corporation, payments are made to the corporation by stockholders who do not care to contest the matter, it is proper to allow the plaintiff an attorney's fee, although the payments were voluntary.

Cross-appeals from a judgment of the superior court for King county, Gilliam, J., entered February 9, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action by stockholders to vacate a sale of property to a corporation and for other equitable relief. Affirmed.

Roberts, Battle, Hulbert & Tennant, C. J. France, and *E. N. Zoline,* for appellant.

Peters & Powell, for respondents.

MORRIS, J.—In May, 1907, appellant commenced this action on behalf of himself and other stockholders of the respondent company. The theory of the action is, that in April, 1905, N. H. Latimer and some fifteen associates organized a syndicate, to acquire the stock and properties of two corporations named the Mutual Light & Heat Company and the Diamond Ice & Storage Company; that at the time of this transaction, Mr. Latimer and all his associates save one were connected with the respondent company as stockholders and in various official capacities, owning and controlling the majority stock of the company; that this syndicate fraudulently combined and conspired to obtain control of the stock and property of the Mutual Light & Heat Company and the Diamond Ice & Storage Company, and to transfer the same to the respondent company, to its great loss and detriment and to the great financial profit of the syndicate, the fraudulent purpose and intent being consummated by the transfer of these properties to the respondent company in June, 1905, some fifty-nine days after the purchase, at an estimated profit of $50,000, which was divided among the

syndicate pro rata with the amount contributed. The relief asked for originally was the setting aside of the transfer to the respondent company, and for the restitution of the purchase price, or for a recovery of the profits made by the syndicate, or those of its members who stood in a fiduciary relation to the company.

The answer admits the organization of the syndicate and the purchase of the properties of the Mutual Light & Heat Company and the Diamond Ice & Storage Company, and the subsequent transfer and sale to the respondent company; denies any fraud or conspiracy to defraud; and affirmatively alleges that the transactions complained of were authorized at a regular meeting of the stockholders of the respondent company; that the appellant was present and voting at such meeting, and was opposed to the action of the majority; that at the time of such authorization, the respondent company had under consideration the execution and delivery to the Northern Trust Company of Chicago of a mortgage or trust deed, to secure an issue of $7,500,000 of its bonds; that it was the intention to then issue $1,150,000 of such bonds and sell the same to N. W. Harris & Company, for the purpose of supplying the company with funds for its corporate uses, among which was the purchase of the stock and properties of the two corporations referred to; that the company was not willing to execute said mortgage, nor to issue said bonds, nor were the owners of the transferred properties willing to transfer the same to the company unless appellant would waive and withdraw his objection; that thereupon appellant did waive all objections to the transaction, and did signify his acquiescence in the same by executing, after a complete investigation and with full knowledge, the following waiver:

"Seattle, Wash., July 17, 1905.

"Messrs N. W. Harris & Co., and N. H. Latimer and his associates in what is known as the Diamond Ice & Storage Co., Syndicate:

"Gentlemen: While the purchase by the Seattle-Tacoma Power Company of the properties of the Mutual Light &

Heat Company and the nineteen hundred ninety-four (1994) shares of the capital stock of the Diamond Ice & Storage Co., as authorized and directed at the meetings of the stockholders of the Seattle-Tacoma Power Company and of the board of trustees of that corporation, held on June 15, 1905, and June 19, 1905, did not meet with my approval as a matter of business expediency, yet after a further and full investigation of all the facts, and in view of the figures submitted and explained to me by Mr. Latimer, and in order that the proposed purchase of certain first mortgage bonds of the said Seattle-Tacoma Power Company may be completed by Messrs Harris & Co., and in order that the sale and transfer of the properties of the Mutual Light & Heat Company and the said shares of stock of the said Diamond Ice & Storage Co. may be finally effected and completed free from any objection upon my part, and in order that the said properties and stock may be brought under the lien of the mortgage securing the said bonds, I do hereby ratify and confirm each and all of the proceedings taken and done at any and all of the said meetings of said board of trustees and of the stockholders of said Seattle-Tacoma Power Company in accordance with and as shown by the copies of the minutes hereto attached.

"Executed in presence of Chas. H. Baker.
"Thomas B. Hardin."

The answer further set forth that, relying upon this waiver of all objections, the aforesaid mortgage was executed in August, 1905, covering the property acquired from the syndicate, and $1,982,000 of bonds issued and sold thereunder. It is further alleged that, in June, 1906, the power company executed an additional or supplemental mortgage to the same trust company, to secure these bonds, and that the property acquired by the power company from the syndicate was purchased in good faith; that is, was fully worth the amount paid, and that no objections were ever made after the purchase until appellant commenced his action, some two years after the transaction complained of. Appellant sought to overcome the effect of this waiver of his objections by pleading in his complaint, in evident anticipation of its value

to respondent as a defense, that it was signed under duress, and that he did not withdraw or surrender his opposition to the alleged wrongful acts of respondent in bringing about the sale and transfer to the power company; and evidently anticipating a charge of laches, he pleaded further that he delayed in bringing suit, hoping some favorable contingency would arise in which the matter might be satisfactorily adjusted. Upon the trial, appellant waived any claim to rescind the sale, and confined his efforts to an attempt to obtain a restitution to the power company of the profits of the sale. Those profits he alleged were about $50,000, while respondent admits the profits to be $24,278.87.

The facts upon which there seem to be now no contention are these: The Seattle-Tacoma Power Company was, in 1905, engaged in supplying electricity to the cities of Seattle and Tacoma, and had been seeking to establish itself in Seattle as a retailer of such power. In this effort it found itself confronted with serious opposition, especially in the business section of the city where the most profitable business was to be found. This opposition was furnished by the Seattle Electric Company, and the Mutual Light & Power Company, each of which was owning and operating a steam-heating plant in connection with its electric lighting business. The Seattle Electric Company's heating franchise covered that portion of Seattle's business district south of Madison street, and the Mutual Light & Power Company and the Diamond Ice & Storage Company's franchise covered that portion north of Madison street. The Mutual Light & Power Company and the Diamond Ice & Storage Company were closely allied corporations, being controlled by a Mr. Crane, and were virtually operated as one company. The situation was therefore this: The Seattle-Tacoma Power Company could sell only light and power; the rival companies could sell heat, light, and power, and in order to obtain the business, could, and did, make rates for light and power at comparatively low rates, while exacting a high rate

for heat, which could be done because of no competition in the territory covered by the respective franchises. These low rates for light and power the power company could not meet and do business on a profitable basis. It therefore found itself in a precarious financial condition. It could not get business, it could not pay dividends, it could not even pay its taxes. At this juncture of affairs it became known that the Mutual Light & Power Company and the Diamond Ice & Storage Company—the Crane properties—were for sale, and it was at once evident that should these properties fall into the hands of the Seattle Electric Company, the power company would virtually have to go out of business so far as the big business of the city was concerned. It was therefore not only desirable, but almost necessary, that the Crane companies should be controlled by the power company.

This situation was called to the attention of the trustees by the manager of the company, in a letter in which he showed how the power company was losing some $60,000 a year by virtue of the situation, and how imperative it was that the Crane properties be acquired and the power company thus put in a situation where it could obtain business in the down-town section of the city. The power company, however, had no money to make this purchase, and it was then that Mr. Latimer, the president of the company, after consultation with its other officials and local stockholders, organized this syndicate and eventually purchased the Crane properties, in order that such properties might be in friendly hands until such time as the power company was in a position to take them over. The purchase by the syndicate was in April, 1905, and on June 19, 1905, at a called meeting of the stockholders, after hearing the report of a committee previously appointed to investigate the Crane properties and report on their value, the purchase by the power company was authorized by the stockholders.

It is apparent from what happened at this meeting that there was a full and complete disclosure of all the facts in

relation to the matter; it was very fully discussed by a number of those present, and all seemed to have a full knowledge and understanding of the situation at the time the purchase was authorized. In addition to the other facts upon which the stockholders acted at this meeting of June 19, were three reports, made in full detail by certified public accountants, showing the exact situation of the Crane properties at the time of the taking of the option to purchase by the syndicate, some time prior to April, the situation in April at the time of the purchase by the syndicate, and the situation on June 19, the day of the purchase by the power company. These reports covered the condition of the Crane properties for the years 1902-3-4-5. The evidence shows, in addition to making known the price at which the syndicate purchased—$320,000—and the price asked of the power company—$349,600—a full statement was made of moneys expended by the syndicate in its control of the property, and the profits of the business during the period of its ownership. In fact, it is difficult after reading the record to imagine what additional knowledge could have been communicated to the stockholders in order for them to obtain a full and complete understanding of the situation. That they did so is evidenced best by their act. Appellant admits the wisdom of their act, by saying in his brief, "the evidence is conclusive in this case upon the point that the properties of the Mutual Light & Heat Company were properties which it was almost necessary for the power company to acquire." It is equally conclusive to our mind, as found by the court below, that at the meeting of the stockholders of the power company on June 19, held to consider the purchase of the Crane properties from the syndicate, "said meeting was fairly held, and that all the facts and circumstances in connection with said sale were fully and clearly disclosed to the stockholders of said Seattle-Tacoma Power Company; that it was fully known and understood by said stockholders at said meeting and prior to said sale, who were the owners of the property and from

whom the same was being purchased and the amount of profit which the sellers were making on such sale; that plaintiff, prior to the consummation of said sale, and with full knowledge of all the facts and circumstances connected with the same, acquiesced in such sale and waived all objections thereto."

The contention of appellant is that the trustees of a corporation stand in a fiduciary relation to the corporation, and are to be regarded as its agents to transact its business for the benefit of its stockholders; that so standing and so acting, all their acts must be for the benefit of the corporation, and not for their own benefit; and if by their acts they receive any profit from the corporation's business, equity will regard such profit as the property of the corporation. As an abstract statement of a legal proposition, that such is the law will readily be admitted; but like every other rule of law, it must be concreted with proper facts, before it will be announced as the law in any given case. No such facts are present in this record. There is nothing in the law to prevent trustees or other officers of a corporation, who may as individuals own certain property which it is necessary or advantageous for the corporation to acquire, from selling such property to the corporation at its fair value, and making a profit on the transaction, when such sale is made with a full disclosure on the one side and a full understanding on the other side of all the facts entering into or affecting the transaction. In so doing they are not within the rule contended for by appellant—dealing with the property of the corporation and reserving to themselves the profits. They are dealing with their own property, which, if desired by the corporation, can be sold and purchased as may any other property derived from any other source.

Appellant in his argument urges the fact that members of the syndicate represented the majority of the stockholders, either in their own holdings or by virtue of proxies from other stockholders, and says, in making disclosures and in selling,

they were disclosing to themselves what they already knew, and purchasing in one relation what they already owned in another. It does not alter the legal situation that the syndicate represented the majority of the stock either in person or by proxy. In voting their own stock, or that which they represented by proxy, they were within their legal rights. The proxy clothed them with full power to represent such portions of the stock, and binds the absent stockholder to the same extent as if so voted in person, in the absence of any fraud or exceeding of authority, as between him and his principal. *Synot v. Cumberland*, 117 Fed. 379. Accepting as a further rule contended for by appellant, that in cases of dealing between a stockholder of a corporation and the corporation itself, the burden is on the stockholder to show good faith and honesty in every feature of the transaction and to such end the transaction will be carefully scrutinized by the courts, the respondent has fully sustained such burden in this instance, and the most exacting scrutiny discloses no evidence of actual or intentional fraud, or other circumstance that should be permitted to impair the validity of the transaction.

We are further of the opinion that appellant, by reason of his written waiver the execution of which induced the purchase, the execution of the trust mortgage and the issuance of bonds, is now estopped from seeking to overthrow such purchase. Neither can we, as pleaded by him, find any duress or other intimidating reason for his execution of such waiver. At the time of the purchase on June 19, 1905, he opposed the purchase. Doubtless he had reason satisfactory to himself for such opposition. One month later he says: "After a further and full investigation of all the facts and in view of the figures submitted and explained," he withdraws his opposition and ratifies and confirms the entire transaction. He then waits two years before again expressing his attitude toward the transaction, when he returns to his first opinion and brings this action to set aside the sale and re-

store the profits. Then he waits another two years before he seeks a trial of his action. That such conduct is laches seems to us irrefutable. *Wright v. Tacoma Gas & Elec. L. Co.*, 53 Wash. 262, 101 Pac. 865.

One other feature of the record requires a ruling. The court below found that, subsequent to the commencement of the action, N. W. Harris & Company and Howard W. Baker, although not made parties by service, yet because of the commencement of the action, paid into the power company the sum of $12,195, and being of the opinion that the corporation had profited to that extent by reason of appellant's suit, it awarded him $750, as an attorney's fee in this action. From this portion of the decree the power company brings a cross-appeal, contending that, inasmuch as the court found no equity in plaintiff's action, it was not justified in awarding him $750 as an attorney's fee for bringing an unjustified suit; and further, there is nothing to justify a holding that these payments were made because of this suit. We are referred by appellant to a number of cases holding that, where a stockholder brings an action for the benefit of the corporation, and recovers property of which it has been deprived, he is entitled to recover a reasonable attorney's fee. Two things occur in these cases which are not present here. The corporation had been wrongfully deprived of its property, and the suing stockholder had been successful in recovering it. The corporation in the case at bar has not been wrongfully deprived of its property; neither has any such property been recovered. Howard Baker paid back his share, it appears, because the amount was small, and he could not afford to bother with it, regardless of the right or wrong of the matter, and have trouble with appellant who is his brother. Harris & Company thought they had a legal right to the money, but inasmuch as they had made a profit on the bonds and were associated in various ways with the Bakers in the affairs of the Baker estate, they preferred to return the money rather than to have any question raised by appellant. It therefore

appears that, while appellant has not been successful in his action in demonstrating that there is property belonging to the corportion that should be restored to it, he has, by reason of his position in the matter, caused the corporation to receive $12,195 it would not otherwise have received. The bringing of this action has enriched the corporation that much. It does not seem equitable to us, although conceding the case is not within the rule generally applied, to permit the corporation to retain this money and appellant bear all the burden of its acquirement. It is probably true that in most cases where counsel fees have been allowed in actions of this character, the payments have been involuntary. Here the payment was voluntary, but it was apparently induced by the commencement of the action, and we think the same rule should obtain.

The cross-appeal is therefore denied, and the judgment as appealed from is affirmed.

RUDKIN, C. J., and CROW, J., concur.

DUNBAR, J., concurs on the ground of estoppel alone.

CHADWICK, J. (dissenting)—I cannot agree with my associates in their disposition of this case. The rule being that trustees of a corporation act in a fiduciary capacity and are to be held to the strictest accountability, a wrong to the corporate body should not go uncorrected because of equities or estoppels arising between individual stockholders. If plaintiff alone were concerned—that is, if the loss or gain were chargeable to him alone, it might be properly held that he was estopped to maintain this action. We may admit that appellant has by his conduct estopped himself, but in this class of cases it is not the right of some individual with which we are concerned, but the fundamental principles of the law, and the rule declared should be applicable in all cases where those in authority use their place and power to exploit a corporate body for their individual gain. This suit is maintained for the benefit of the corporation which has suffered

a wrong which, by reason of the majority stock holdings of the manipulators of the deal, it was powerless to prevent. In Morawetz on Private Corporations, vol. 1 (2d ed.), § 262, it is said:

"The benefit of an action brought by a corporation necessarily results to all the shareholders equally, even where a portion of them were parties to the wrong, or have, by acquiescence, forfeited their equitable claims to redress. And this result is not, as a rule, unfair. The only possible method of working out the rights of the parties in a case of this kind is to preserve the fiction of a separate corporate entity, and to enforce the collective and the individual rights and obligations of the shareholders separately. It is clear therefore, that the acquiescence of a shareholder in violation of the corporate rights, or even a participation in the wrong,would not deprive him of his interest in the cause of action belonging to the corporation as an entity. He would have a share in the benefits of a recovery, even although his personal liabilities should be thereby increased."

The record shows that the acquisition of the Mutual Light & Heat Company and the Diamond Ice Company, known as the Crane companies, was essential to the life of the power company. This was known to Mr. Latimer and his associates. They confess it, justifying the purchase of the competing companies in their own names by saying that the purchase was so made that the Crane companies might not fall into unfriendly hands. But the fact remains that they did not purchase it in their individual capacity, or at all, until they had a purchaser for the property at such figure as they might choose to put upon it. They controlled the stock of the buying as well as the selling corporations. They took no chances. As officers of the power company, they had a right to purchase the competing companies, of course, but only for the benefit of the power company; for equity will not allow them either to buy the competing companies which were admittedly in a position to destroy the power company, and thus take the work of destruction in their own hands in defiance of their duties as trustees, or, as they did in this case, turn the prop-

erty over to the power company at a greatly increased price and to their personal profit. The transaction should be held to have been made for the benefit of their principal.

In Simmons v. Vulcan Oil & Min. Co., 61 Pa. St. 202, 100 Am. Dec. 628, 630, the court quoted from Lindley on Partnership, as follows:

"Judging from recent events and disclosures, nothing seems more common than for a person in getting up a company to obtain for the company property of which it is in want, and try and make the company pay him more than he gave for it. Such a transaction can never stand. There may undoubtedly be a valid sale to a company by persons engaged in getting it up; but once let it be shown that the alleged vendor obtained the property when it was his duty to obtain it for the company, and it immediately follows that he cannot, without the fullest disclosure on his part, charge the company with more than he actually gave;"

citing *Bank of London v. Tyrrell*, 5 Jur. N. S. 924, and *Great Luxembourg R. Co. v. Magney*, 25 Beav. 586.

In Thompson on Corporations (2d ed.), § 1246, it is said of the duties owing a corporation by the directors, that:

"Well-settled rules forbid them acquiring for themselves the property which it is their duty to acquire for the corporation and which is necessary for its purposes. It is said that such dealing would be equally as objectionable as purchasing from the corporation land which it was their duty to sell on its behalf. 'In respect to this class of dealings, directors of corporations stand upon the same footing as ordinary trustees.' It is a familiar rule that a trustee is disqualified to act by the intervention of a personal interest in the performance of his duties as such trustee; and such trustee is not permitted to obtain title to property where he has any duty to perform which is inconsistent with the character of a purchaser on his own account. The rule was stated by the supreme court of Utah as follows: 'The president and board of directors of a corporation are trustees, and act in a fiduciary capacity for its stockholders and while doing so are forbidden, in equity, to acquire any interest in a property hostile to the interests of the stockholders.' Officers acting as agents of a railroad corporation cannot be permitted while acting as

such, to buy lands ostensibly for their corporation and take conveyances to themselves for the purpose of reselling it to the corporation at an advance. Thus, the law will not permit directors of a corporation formed for the purpose of constructing a railroad, whose duty it is to acquire the right of way, to expend the funds of the corporation in making expensive improvements upon land necessary for the roadway, but which the corporation has not acquired the right to use, and at the same time to purchase the identical land in their individual right, and avail themselves of the title thus acquired to make extortionate demands upon the company for the use of such land. The rule as to the duty of directors in such cases has been stated thus: 'It is a breach of their fiduciary obligations which equity will not tolerate for such officers, in antagonism to the corporate interest, to oust the corporation from beneficial property rights which ought to be preserved to it by acquiring the property themselves. Derelictions of this kind are treated as a fraud on the corporation from which equity will raise a constructive trust in its favor.' On this principle, the officers of a corporation were not permitted to purchase lands on which the corporation had a lease. A director will not be permitted to act in hostility to the corporation and to acquire for his own benefit a lease of the premises occupied by such corporation or of premises necessary for its use. In such a case he will be treated as trustee of the lease so acquired by him."

In *Pepper v. Addicks*, 153 Fed. 383, at page 405, the court, speaking to the same subject, says:

"His liability rests upon the fundamental principle that one who occupies a position of trust and confidence—such as the president, or a director, of a corporation—shall never be permitted to abuse his official position by dealing with the corporate property for his private gain. If he so deals, by whatever tortuous devices, his acts are voidable if his trail can be followed, and he may be called upon to account for the profits that he has wrongfully made. If authority is needed for so plain a proposition, it may be found in *Wardell v. Railroad Co.*, 103 U. S. 651; *Fox v. Mackreth*, 1 Lead. Cas. Eq. (4th Am. Ed., Hare & Wallace's Notes) 237 et seq.; *McCants v. Bee*, 16 Am. Dec. 616, note; *Wilson v. Brookshire*, 9 L. R. A. 792, note; *Hindman v. O'Connor*, 13 L. R. A. 490, note; 4 Thompson, Corporations, §§ 4672, 4674."

In this case the promoter of the deal was the president of the corporation and also a director. He controlled 26,792 shares of stock. A majority of the directors of the corporation were interested in the syndicate and profited thereby. Members of the syndicate had control of 30,551 shares of the total 35,000. It is because of situations like this that courts have intervened and frowned upon all attempts of favored stockholders and officers of corporations to enrich themselves at the expense of their companies.

Much has been said about a full disclosure of the facts. It is utterly immaterial and should in no way affect the issue. That the syndicate should make a full disclosure to the power company was a mere pretense to satisfy the law, for the men composing the syndicate were at the same time the majority stockholders of the power company. They were merely passing the property from their right hand to their left. They disclosed to themselves only what they already knew, and did what they would not have undertaken to do if they had not been in control with power to receive the property. When the same man buys and sells, what comfort to the minority stockholder or the corporate entity is there in finding that, precedent to the transfer, he made a full disclosure of the facts—to himself? The record in this case shows simply an artful deal in high finance, and the profit, less a just return to the promoters of the scheme, for the use of the money advanced; and such expenses or expenditures as were put out for the maintenance of the Crane companies should be covered back into the treasury of the power company. It should not be possible, for it is against the policy of the law, to defeat these just principles by bookkeeping methods which can at best cover the real transaction with a transparent veil.

[No. 8958. Department One. January 11, 1911.]

HARRY SILVER, *Respondent*, v. LONDON ASSURANCE CORPORATION, *Appellant*.[1]

INSURANCE—FIRE INSURANCE—VACANCY OF BUILDING—EVIDENCE OF OCCUPATION—SUFFICIENCY. The evidence sufficiently shows that a saloon was not vacant and unoccupied at the time of a fire, Saturday night, where a witness testified that he had rented it on the Monday before, had cleaned and arranged it on Friday and Saturday, had bar fixtures and part of his stock in the building, and had opened for business and made some sales on Saturday.

SAME. The evidence warrants a finding that a saloon was not vacant and unoccupied for ten days prior to a fire on June 28th, where the sheriff had possession under legal process and put a watchman in possession who watched the building for ten or fifteen days, beginning as late as June 6th or 7th.

SAME—POLICY—"OCCUPIED AS SALOON"—CONSTRUCTION. A policy of fire insurance on a building "occupied as saloon," with a forfeiture clause if vacant for more than ten days, does not require that the building be occupied as a saloon, the words being descriptive only; and it is not vacant if in the possession of a watchman of the sheriff under legal process.

SAME—CHANGE OF INTEREST—PLEADING—WAIVER OF OBJECTION. In an action on a fire insurance policy, a stipulation forfeiting the policy in case of change of ownership or interest cannot be urged unless it is pleaded.

SAME—CHANGE OF INTEREST—INCREASE OF HAZARD—BURDEN OF PROOF. Under the clause that a fire insurance policy shall be void in case of change of interest or possession, except change of occupancy without increase of hazard, the burden is upon the company to prove that possession of an officer under legal process increased the hazard, as it will not be presumed.

SAME—POLICY—BREACH OF CONDITION—VACANCY—REOCCUPANCY. An insurance policy providing that the same shall be void if the building be or become vacant or unoccupied and so remain for ten days, is not terminated, but only suspended during such vacancy, and has no application to a loss occurring after it was reoccupied.

APPEAL—REVIEW—HARMLESS ERROR. Where the jury found that the plaintiff was the owner of a building destroyed by fire, it is not

[1]Reported in 112 Pac. 666.

prejudicial error that the court excluded evidence of the bad fire record of one F., whom the defendant claimed to be the owner of the building.

WITNESSES—CROSS-EXAMINATION. It is not proper cross-examination to question the plaintiff as to his knowledge of a matter constituting defendant's affirmative defense.

TRIAL—INSTRUCTIONS. The words, "now, coming to the other branch of the case," in an instruction, are merely introductory and not objectionable as indicating that the other defenses were immaterial.

Appeal from a judgment of the superior court for King county, Gay, J., entered January 4, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a policy of fire insurance. Affirmed.

H. T. Granger and *Fred G. Clarke*, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

GOSE, J.—This is a suit upon a fire insurance policy. There was a verdict and judgment for the plaintiff. The defendant has appealed.

On the 4th day of February, 1908, the appellant issued to the respondent its policy of insurance for the term of one year from that date, whereby it insured him against loss by fire to an amount not exceeding $1,300, on two one-story frame buildings, each occupied as a saloon. The two buildings were separated by a partition only, and were insured for $650 each. On the 28th day of June, 1908, both buildings were totally destroyed by fire. The appellant resists recovery upon two grounds: (1) It is alleged that the respondent did not own the property at the time the policy was issued or at the time of the fire, but that it was at all times owned by one Finkelberg, who, on account of a bad fire record, could not obtain insurance, and that for the purpose of obtaining the policy he conspired and agreed with the respondent to, and did, convey the property to him, and that the policy was taken for the benefit of Finkelberg; and (2) that the policy provides:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void . . . if a building herein described, whether intended for occupancy by the owner or tenant, be or become vacant or unoccupied, and so remain for ten days;"

and that at the time of the fire both buildings were vacant and unoccupied and had been unoccupied for a period of more than ten days. The reply denied the ownership of Finkelberg, denied that the buildings were vacant and unoccupied at the time of the fire, and admitted that the policy contained the provision quoted.

It is earnestly insisted that the record discloses that neither of the buildings was occupied at the time of the fire. We think that there is evidence which warranted the jury in concluding that both buildings were occupied at that time. Kichinko, a witness for the respondent, testified that he had rented one of the buildings for a saloon, on Monday before the fire, which occurred the following Saturday night; that he cleaned and arranged it on Friday and Saturday; that he had the bar fixtures, stove, chairs, pool tables, glasses, cigars, and a barrel of soda in the building; that he had a license, and that he opened the place for business on Saturday, and made some sales. The sheriff had possession of the other building on a legal process, and had put a watchman in possession. The watchman testified that he had charge of this building in 1908; "I should judge along the beginning of June," and that "I watched in there from ten to fifteen days. I am not sure. I ain't certain of it;" and that, if he remembered correctly, it was unoccupied eleven or twelve days, but whether before he began watching or after his duties had terminated does not clearly appear. The jury was warranted in inferring from his testimony that he began watching the building as late as the 6th or 7th of June, and that his duties ended fifteen days later, which would be less than ten days before the fire. It cannot, therefore, be ruled, as a matter of law, that he was not in possession within ten days before the date of the fire.

The appellant, however, contends that, if the watchman was in charge of the building within ten days before the date of the fire his possession was not such an occupancy as the contract and the law contemplates. The language of the policy, which is the same as to both buildings, is "$650 on the one-story frame building occupied as a saloon." It is said that the word "occupied" should be given its ordinary and popular meaning, and as applied to this building means such occupancy as ordinarily attends or is exercised over a saloon building while being used as such. The vice of this position is that the policy does not provide that the building shall be devoted to saloon purposes. The words "occupied as a saloon" are words of description only. As was said in *Burlington Ins. Co. v. Brockway*, 138 Ill. 644, 28 N. E. 799:

"If the company desired to make its liability contingent upon the continued occupancy of the house as a dwelling, it would have been very easy and natural to have stated that among the other conditions expressed."

In that case the policy in describing the property insured used the words, "on the two-story shingle-roof frame building while occupied by assured as a store and dwelling house." Some weeks before the fire, the building was abandoned as a dwelling, but continued to be occupied as a store until it burned. The policy provided, as in this case, that it should be void "if the premises hereby insured are or shall hereafter become vacant or unoccupied," without notice, consent, etc. It was contended that the company undertook to insure the building only so long as it continued to be occupied both as a store and a dwelling, and in meeting this contention the court said that a provision in a policy will not be construed to be a continuing warranty unless expressed in apt words. In *Doud v. Citizens' Ins. Co.*, 141 Pa. 47, 21 Atl. 505, 23 Am. St. 263, the tenant moved out of the house on Tuesday, the owner went to the house and stayed during Wednesday, placed a man in charge, went to her home and packed on Thursday preparatory to moving into the house on Friday, and was

prevented from doing so by the burning of the house on that day. Her offer to prove that she put a man in charge of the house on Wednesday, to remain until Friday, was denied. This was held to be error. See, also, *Traders' Ins. Co. v. Race* (Ill.), 29 N. E. 846; *Stensgaard etc. v. National Fire Ins. Co.*, 36 Minn. 181, 30 N. W. 468; *Shackelton v. Sun Fire Office*, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698.

In the *Shackelton* case, a watchman or overseer was in charge of the building when the fire occurred. This was deemed a sufficient occupancy. The appellant has cited a number of cases which, it contends, show that the possession of the watchman was not an occupancy within the meaning of the policy. There is a conflict in the authorities, and an attempt to harmonize them would be futile. However, the facts in the cases cited differ so materially from the facts here that it may be said that they state no more than general principles. Each case must be determined largely upon its own peculiar facts. Viewing the case from the standpoint of the object to be attained, viz., to guard against an increase of hazard, caused by nonoccupancy, it would seem to be a common-sense view that the possession of a watchman, acting under a sheriff under legal process, would be such an occupancy as would satisfy the burden imposed by the policy upon the insured. The burden of proving that the buildings were unoccupied was upon the appellant.

It is said that the court erred in instructing the jury that the building was not unoccupied while it was in charge of an officer of the law. In urging this view, the appellant relies upon another provision of the policy, in the following words:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if any change other than by the death of an insured take place in the interest, title or possession of the subject of insurance (except change of occupancy without increase of hazard) whether by legal process or judgment or by voluntary act of the assured or otherwise."

The point is not well taken, (1) because the clause was not pleaded and is therefore not an issue; and (2) there is no evidence that the change of occupancy increased the hazard. The burden was on the appellant to prove that fact. It will not be presumed to follow from the possession of an officer of the law. *Hoover v. Mercantile Town Mut. Ins. Co.*, 93 Mo. App. 111, 69 S. W. 42. In the cases cited by the appellant under this head, there was a change of title and there were no exception clauses in the policies.

The testimony shows that, after the policy was issued, both buildings were unoccupied for a period of more than ten days. As we have said, it also shows that one of the buildings was in the possession of a tenant at the time of the fire, and that there is no direct evidence that the other building was not in the possession of the watchman within ten days preceding that date.

It is contended that a vacancy for the period of ten days terminates the policy, and that its operative force is not restored by a reoccupancy. Several authorities are cited which support that view. The question, however, is no longer an open one in this state. In *Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 59 Wash. 501, 110 Pac. 36, this court, after an exhaustive review of the cases, announced the rule that a provision in a policy of insurance, to the effect that the policy shall be void upon the doing of a prohibited act or the failure to do an act agreed to be performed by the insured, only suspends the operation of the policy while the condition is broken, and has no application to a loss occurring at a time when there is no breach of the contract. Among others, the following authorities are cited to support the text: *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; *Insurance Co. of North America v. Pitts*, 88 Miss. 587, 41 South. 5, 117 Am. St. 756, 7 L. R. A. (N. S.) 627; *Athens Mut. Ins. Co. v. Toney*, 1 Ga. App. 492, 57 S. E. 1013; *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; *Born v. Home Ins. Co.*, 110

Iowa 379, 81 N. W. 676, 80 Am. St. 300; *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.*, 76 S. C. 76, 56 S. E. 654, 121 Am. St. 941, 10 L. R. A. (N. S.) 736.

In the *Hinckley* case, the insurance company sought to defeat a recovery because the insured conducted a saloon business without a license for a short time. He had a license when the policy was issued and when the fire occurred. The property insured was saloon equipment, furniture, fixtures and stock. In considering this contention, the court said that the word "void," as used in policies of insurance, does not signify under all circumstances an absolute and permanent avoidance of a policy which has begun to run, but that it may be held to mean a temporary suspension of liability; and, quoting from 1 Phillips on Insurance, § 975:

"To carry it further is to inflict a penalty upon the assured, and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it."

In the *Pitts* case, while the policy was in force, the premises were vacant at one time for more than ten days, but were occupied when the fire occurred. The policy provided that it should be void if the building "be or become vacant or unoccupied and so remain for ten days." The court said that, if the loss had occurred during the prohibited vacancy, there could be no recovery; but that occupancy revived the insurance, and that any other rule would be a harsh construction of a technical word. In the *Toney* case, it was held that the policy was suspended during the period of the prohibited vacancy, and revived by reoccupancy. The court said:

"But we place our decision squarely on the proposition that the violation of the condition as to vacancy in this case in no wise contributed to the loss. The increased hazard existed while the house was vacant, and when the house was reoccupied the danger from vacancy was terminated, and the policy again attached and became of binding effect."

The point is made that the court erred in sustaining an objection to a question put to a witness as to Finkelberg's fire

record, and in denying the appellant the right to cross-examine the respondent as to his knowledge of that fact. These contentions have no force, in view of the fact that the jury necessarily found that the respondent was the owner of the property. The court instructed the jury that, if they believed that the respondent and Finkelberg conspired to conceal the true ownership of the property; that it was placed in the name of the respondent for that purpose; and that the policy was issued with that fact concealed, there could be no recovery. Moreover, the appellant offered evidence that Finkelberg had a bad fire record, and the respondent offered no countervailing evidence. The question put to the respondent was not proper cross-examination. If Finkelberg had a bad fire record, that was a part of the affirmative defense, and could not be established upon the cross-examination of the respondent. The real issue under this defense was, whether the respondent owned the property. If he did, the good or bad fire record of Finkelberg would be a matter of no concern to the appellant.

The court, in instructing the jury, said: "Now, coming to the other branch of this case which the defendant relies on or has pleaded," etc. It is said that the language quoted conveyed the impression to the jury that the other defenses pleaded were immaterial. It is obvious that the statement was merely introductory to another phase of the case upon which the court desired to instruct.

The view we have taken of the facts of the case makes it unnecessary to determine whether the vacancy of one of the buildings for more than ten days before the fire would defeat a recovery on either or both buildings, and also the technical meaning of the words "if a building herein described" becomes vacant or unoccupied.

The judgment is affirmed.

Rudkin, C. J., Fullerton, Parker, and Mount, JJ., concur.

[No. 9140. Department One. January 12, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Wallace A. Bussell et al., Appellant*, v. DAN R. ABRAHAM *et al., Respondents.*[1]

CONSTITUTIONAL LAW—DUE PROCESS—WATERWAY DISTRICT—STATUTES—VALIDITY. Rem. & Bal. Code, § 8166 *et seq.*, providing for the creation of commercial waterway districts, at the expense of the property benefited, is void in that it directs an assessment to be made on the lands benefited, but no person or board is authorized to make the assessment, and no provision is made for an assessment roll or equalization of the same, and the owners are given no notice or opportunity to be heard; and the provisions therein for a jury to assess the damages for land taken cannot be construed as authorizing the jury to assess the benefits.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 15, 1910, affirming an order made by a board of county commissioners establishing a commercial waterway district, after a hearing before the court. Reversed.

Robert A. Devers, for relators.

Shorett, McLaren & Shorett, Geo. F. Vanderveer, M. H. Ingersoll, and *Bausman & Kelleher*, for respondents.

FULLERTON, J.—The legislature of the state of Washington, at the specially convened session of 1909, passed an act intended to provide for the construction and maintenance of commercial waterways. Laws Special Session, 1909, page 8; Rem. & Bal. Code, § 8166 *et seq.* Acting in accordance with the provisions of the act, certain citizens of the county of King petitioned the board of county commissioners of that county to establish a commercial waterway district therein, comprised of territory specifically described in the petition. The board of county commissioners assumed jurisdiction of the petition, and thereafter, upon due procedure being had as

[1]Reported in 112 Pac. 671.

contemplated by the statute, entered an order purporting to create a commercial waterway district.

The relators own property included within the boundaries of the proposed district, and appeared before the board of county commissioners and opposed the creation of the district, alleging as grounds therefor, among others, that the act under which the proceedings were being had were in violation of both the state and Federal constitutions. Their objections were overruled, whereupon, after the establishment of the district, they sued out a writ of review from the superior court of King county, seeking to review the order of the board. The superior court, on a hearing had thereon, affirmed the order creating the district, and dismissed the writ. This appeal was taken therefrom.

While many objections are urged in this court against the statute and the proceedings had thereunder, we have found it necessary to consider only the constitutional question suggested, as we deem it fatal to the proceedings. The law plainly contemplates that the expense of contructing the commercial waterway for which the district is organized shall be provided for by an assessment upon the real property situated in the waterway district benefited by the improvement, yet no person, board, or other authority is authorized by the act to make the assessment. Nor does the act contain any direct provision for making an assessment roll, nor any provision for its equalization when made, at which the property holder may be heard as to the amount that may be charged against his property. Since no other means of raising the necessary cost of making the improvement is contemplated than by an assessment, we think that the assessment is so far an integral part of the act that the omission to make it effective renders the whole act void. *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116; *Snohomish County v. Hayward*, 11 Wash. 429, 39 Pac. 652; *Franklin Sav. Bank v. Moran*, 19 Wash. 200, 52 Pac. 858.

Counsel for the respondent, however, while conceding there is no direct provision in the act empowering any particular person or body to make an assessment of benefits, contend that the act, by necessary implication, confers that power upon the jury called to determine the just compensation to be paid owners whose property will be taken by the improvement. To sustain the contention we are cited to certain sections of the act which we will briefly notice. After provisions relating to the organization of the waterway district and the election of a board of waterway commissioners, it is provided in § 11 of the act, that whenever it is desired to prosecute the construction of a system of waterways within the district, the board of commissioners shall file a petition in the superior court of the county in which the district is located, setting forth therein the route over which the waterway is to be constructed, the estimated cost thereof, the names of the owners and occupants of the lands within the proposed district, the maximum amount of benefits to be derived by each tract of land from the construction of the proposed improvement, a description of the land necessary to be taken for the purpose of the proposed improvement, the names of the owners and occupants thereof, and certain general statements to the effect that the improvement will be of public benefit, conducive to public health, increase the public revenue, and that the proposed system is necessary. Section 13 (Rem. & Bal. Code, § 8178), provides that, upon filing the petition, a summons shall be issued, returnable as summons in other civil actions, and served either personally or by publication upon all parties interested. Section 15 (Id. § 8180) provides that upon the return of the summons, or as soon thereafter as the business of the court will permit, the court shall proceed to hear the petition, and "shall impanel a jury to ascertain the just compensation to be paid for the property taken or damaged," by the proposed improvement. Section 23 (Id. § 8188), provides that:

"Any final judgment or judgments rendered by said court upon any finding or findings of any jury or juries, or upon

any finding or findings of the court in case a jury be waived, shall be lawful and sufficient condemnation of the land or property to be taken, or of the right to damage the same in the manner proposed, upon the payment of the amount of such findings [and] all costs, which shall be taxed as in other civil cases."

Section 27 (Id. § 8192), reads as follows:

"Upon the entering of the judgment upon the verdict of the jury, the clerk of said court shall immediately prepare a transcript which shall contain a list of all of the names, persons and corporations benefited by said improvement, and the amount of benefit derived by each respectively, and shall duly certify the same, together with a list of the land benefited by said improvement belonging to each person or corporation, and shall file the same with the auditor of the county, who shall immediately enter the same on the rolls of the taxes, as provided by law, for the entry of the taxes against the land of each of the said persons named in said list, together with the improvements therefor, and the same shall be subject to the same interests and benefits, in case of delinquency, as in cases of general taxes, and shall be collected in the same manner as other taxes, and subject to the same right of redemption, and the land sold for the collection of said taxes shall be subject to the same right of redemption as in the sale of land for general taxes: Provided, That said assessments do not become due and payable, except at such time or times and in such amount as may be designated by the board of commissioners for said commercial waterway district, which designation shall be made to the county auditor by said board of commissioners of said commercial waterway by serving a written notice upon the county auditor, designating the time and amount of assessment, said assessment to be in proportion to the benefits to become due and payable, which amount shall fall due at the time of the filling out of general taxes, and the amount so designated shall be added by the auditor to the general taxes of said person or corporation, according to said notice upon the assessment rolls in his said office and collect therewith. Provided further, That no one call for assessments by said commissioners shall be in an amount to exceed 25 per cent of the actual amount necessary to pay the costs of the proceedings and the assessment of said district and

system of commercial waterways, and the costs of construction of said work."

Section 30 (Id. § 8195), provides for changes in the system of improvements, manner of construction, and course of the waterway, should the commissioners deem the same desirable, and for the appropriation of such additional land as may be necessary to make the required changes; and to ascertain the amount of compensation and damages to be paid the owners of the land taken by the change, it is provided that the court,

"Shall cause a jury to be impaneled as in the case of the original proceedings for the establishment of said improvement, and upon the final hearing of said cause the jury shall return a verdict in the amount of damages, if any, sustained by all persons and corporations, the same as upon original petition, by reason of such proposed change; and the amount of compensation to be paid to any persons or corporations therefor, and for any additional right of way that may be necessary to be appropriated by reason of such proposed change, and shall readjust the amount of benefits claimed to have been increased or diminished, if any, of said land owners by reason of such proposed change in said improvement, and the proceedings thereunder would be the same as to rendering judgment, appeal therefrom."

It is on these sections of the act that counsel base their contention that the jury is empowered to assess the benefits, but we think they fall far short of sustaining it. The last section cited, it is true, provides that the jury shall "readjust the amount of benefits claimed to have been increased or diminished," by reason of any changes made in the assessment district or waterway, and were the language of the original section obscure, might raise an inference that the jury were to make the original assessment. But the language defining the powers of the jury in the first instance is not obscure. It clearly limits the power of the jury on the first hearing to a determination of the "just compensation to be paid for the property taken or damaged," nothing more.

It has been suggested, however, that the legislature intended

that the original estimate of benefits set forth in the commissioners' petition to establish the district should be taken as an assessment of benefits, and that it is from this estimate the clerk is required to prepare his transcript of the "names of persons and corporations benefited by said improvement . . . . . and the amount of benefit derived by each respectively," but this theory would be fatal to the act if adopted. It is essential to the validity of any law authorizing an assessment for benefits that the owner of the property assessed be given notice of the proceedings and an opportunity to defend against the assessment before his property is taken to satisfy the assessment charge. It is not necessary that he have notice of every step taken in the proceedings, but the law to be valid must give him at least one opportunity to be heard as to the amount and legality of the tax. *State ex rel. American Sav. Union v. Whittlesey*, 17 Wash. 447, 50 Pac. 119; *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112; *Davidson v. New Orleans*, 96 U. S. 97.

Construing the statute as one authorizing the commissioners to make the assessment, it is invalid because it does not give the owners of the property assessed an opportunity to be heard as to the amount and legality of the assessment before their land is sold in satisfaction thereof.

The judgment appealed from is reversed, and the cause remanded with instructions to enter a judgment quashing the proceedings had before the board of county commissioners, and holding the same to be void and of no effect.

RUDKIN, MOUNT, PARKER, and GOSE, JJ., concur.

[No. 8952. Department One. January 17, 1911.]

ELLA J. BOOK *et al.*, *Appellants*, v. GEORGE H. THOMAS *et al.*, *Respondents.*[1]

PUBLIC LANDS—TIDE LANDS—PREFERENCE RIGHT TO PURCHASE—ABUTTERS—HOLDER OF LEGAL TITLE. The statute giving to the owner of uplands the preference right to purchase abutting tide lands from the state for the period of sixty days after the filing of the tide lands plat, has reference to the owner of the legal title to the uplands during the sixty days when the right must be exercised; and confers no rights upon a vendee in possession under a contract of sale with deed in escrow, who did not acquire legal title by full payment of the price and delivery of the deed until nine months after the tide lands plat was filed.

SAME—CONTRACT OF SALE—RESERVATION—CONSTRUCTION. It will not be inferred that a vendor of uplands retaining legal title, intended to assign his preference right to purchase tide lands prior to parting with his title, by reason of the reservation in his contract of the mutual use of a dock situated on the tide lands; since the reservation shows either that it was thought that the dock was partly on the upland, or that it might pass as an appurtenance unless reserved.

SAME—TITLE—WHEN PASSES—RELATION—DEEDS—DELIVERY—ESCROW. Where the vendor of uplands under contract of sale executed and placed in escrow a deed, the delivery of the deed cannot be held to relate back to the time of the delivery in escrow, so as to work an assignment of the vendor's preference right to purchase tide lands as owner of the legal title prior to final payment and final delivery of the deed.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 30, 1910, upon findings in favor of the defendants, upon appeal from an award of the state board of land commissioners, in a contest over the preference right to purchase tide lands. Reversed.

G. C. Israel, for appellants.

John C. Hogan and *Blaine, Tucker & Hyland*, for respondents.

[1]Reported in 112 Pac. 917.

Gose, J.—On the 16th day of February, 1907, the plat of the Aberdeen tide lands was filed in the office of the commissioner of public lands. On March 23 following, the appellant Ella J. Book filed in the same office an application to purchase all the tide lands involved in this action. On April 13 following, the respondents Thomas filed their application to purchase the same tide lands. After hearing on the merits, the board of state land commissioners awarded the preference right to purchase to the appellants. Upon appeal to the superior court, this judgment was reversed, and the preference right to purchase was awarded to the respondents Thomas. The Books have appealed.

The material facts upon which the respective preference rights are asserted are as follows: On the 6th day of December, 1902, the appellants Book were the owners of about nine hundred acres of upland lying along the Chehalis river where the tide ebbs and flows, and in and adjoining the city of Aberdeen. On that day they entered into a written contract with one Coughlin, whereby they agreed to sell and convey to him an undivided one-half of the land, for a consideration of $12,500, of which $5,000 was then paid. The balance of the purchase price, with interest, was to be paid on or before November 29, 1907. On the same day they entered into a similar contract with one Gregory, by the terms of which they agreed to sell to him an undivided one-fourth of the land for $1,000, to be paid on November 29, 1907. If the final payment was made on the Coughlin contract at the time agreed upon, Gregory was to receive a deed without further payment. The one-fourth interest in the land evidenced by his contract was to be conveyed to him in payment of his commission for effecting the sale to Coughlin, but only upon the fulfillment of the contract by the latter. Time was made of the essence of each of the contracts, and Coughlin and Gregory took possession of the property.

On the 18th day of March, 1905, Gregory conveyed his interest in the land to the respondent Lizzie G. Thomas, by

a deed of quitclaim. On the 4th day of May following, Coughlin and his wife assigned their contract to the same party. The respondents Thomas then entered into and continued in the possession of the land. On December 6, 1905, the appellants Book and the respondents Thomas entered into a provisional agreement, dividing the land and providing the part or portion which each thereof should have, and stipulating that the property should be conveyed by a warranty deed, that the abstract should show a clear title, and that the conveyance should be made "upon payment by said second party [meaning the respondents Thomas] to the said first parties [the appellants] of the balance due under the Coughlin contract," and that "nothing in this agreement shall be construed as abrogating or modifying the Coughlin or Gregory contracts relating to said ranch, held by the parties of the second part, and said contracts shall remain in full force and effect, and when this agreement is fully performed by both of the parties hereto and the mutual conveyances herein provided for made, said Coughlin and Gregory contracts shall be cancelled." On the 18th day of May, 1906, the appellants executed a warranty deed in favor of respondents Thomas, and placed it in escrow. This deed embraced the property which the provisional agreement between the same parties stipulated should be conveyed to them. In November, 1907, and before the 29th day of the month, final payment was made as required by the Coughlin and Gregory contracts, and the escrow deed was delivered. It conveyed certain upland, and the habendum clause contained the language: "To have and to hold the said premises, together with the tenements and appurtenances, unto the said party of the second part," etc. The trial court found that, in entering into the provisional partition agreement, the parties took into consideration the tide lands in front of the property, and that it was their intention to acquire the tide lands in front of the uplands, respectively assigned to them.

This finding was made effective by the decree, and its correctness is challenged by the appeal. Whether it is correct, is the pivotal question in the case. It must be kept in mind that all the contracts are in writing. We must, therefore, look to the instruments themselves to get the intention of the parties.

The respondents insist that language may be found in both the provisional agreement and the deed to support the finding. The former provides, among other things, "Also that said parties shall have the mutual enjoyment of the dock now upon said ranch." The deed provides: "There is further reserved by the said first parties the right to the mutual use and enjoyment with the parties of the second part, their grantees or assigns, of that certain dock or wharf now situated upon the lands herein conveyed," with the right of ingress and egress. The court found, and we find nothing in the record to contradict it, that the dock or wharf was situate wholly upon the tide lands in front of the uplands described in the deed. A reference to the dates already stated will disclose that the respondents did not become the owners of the *legal title* to any part of the uplands, until long after the sixty days expired for the exercise of the preference right given by the statute, nor did they become the owners of any thereof until after the appeal had been taken from the order of the board of state land commissioners.

The argument of the respondents that the agreement and deed operate as an express and intentional assignment of the preference right to purchase the tide lands in front of the uplands, set apart and conveyed to them by these instruments, cannot be upheld. Nor is the argument that such right passed as an incident to the upland based upon any securer foundation. We think this court is committed to the view that the statute, giving the preference right to purchase tide lands to the owner of the abutting uplands, means the owner of the legal title during the sixty days when such right must be exercised.

In *Hays v. Merchants' Bank of Port Townsend*, 10 Wash. 573, 39 Pac. 98, it was held that one who had acquired the legal title to the upland through a sheriff's deed, before the hearing was had before the board of state land commissioners to determine who had the preference right to purchase the tide lands, but who only had a sheriff's certificate of sale until some months after he had filed his application to purchase, was not the owner within the meaning of the statute. In passing upon the conflicting claims, the court said:

"And it would be altogether unjust to allow a contestant who has no present right to contest to go into the land-office and file a claim based on no title in himself, and after months of delay beyond the time permitted for the filing of contests, give him the land upon the basis of some after-acquired title. Moreover, we do not think it was the intention of the legislature that these applications for purchase of tide lands, by shore owners, should be based upon anything but legal title. The board is not a court of equity, and it is not constituted for the adjudication of either equitable or inchoate rights. It must be satisfied of course, that ownership exists, but it takes things as they are at the time of application and within the time allowed for contest."

It is said, however, that there is such a difference between a judicial sale and a sale arising out of an express contract that the *Hays* case may be distinguished upon that ground. The vice of this view is that the *Hays* case is not put upon that ground, but upon the ground that the statute only applies to the holder of the legal title at the time the right is sought to be exercised. In *Book v. West*, 29 Wash. 70, 69 Pac. 630, the owner of the upland mortgaged it, "together with all and singular the appurtenances and tenements now or hereafter belonging." The title to the tide lands was then in the state. The upland owner had erected upon the tide lands a wharf and building, which projected a short distance onto the upland and was in the possession of the same when the mortgage was executed. The contention that the mortgage embraced such right, title and possession as the mort-

gagor had in the tide lands and the improvements thereon, was rejected. In *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988, it was held that the preference right given to the upland owner to purchase tide lands is not a right of property, but a mere gratuity; and in *State ex rel. Wilson v. Grays Harbor & Puget Sound R. Co.*, 60 Wash. 32, 110 Pac. 676, we held that such right is not a vested right against the state prior to purchase.

The respondents cite *Seattle & M. R. Co. v Carraher*, 21 Wash. 491, 58 Pac. 570, and *Hotchkin v. Bussell*, 46 Wash. 7, 89 Pac. 183. Neither of these cases affords them any aid. In the *Carraher* case, it was held that the grantee of the uplands had the preference right to purchase the tide lands as against one claiming under a later conveyance of the tide lands by the same grantor. In the *Hotchkin* case, it was held that a preference right to purchase tide lands may be abandoned or assigned, and that it will descend to the heirs upon the death of the ancestor in whom the right exists. All the contracts have reference to uplands. Had it been the intention of the parties in the partition agreement that each should have the preference right to purchase the tide lands in front of their respective uplands, without regard to who held the legal title when the right was to be exercised, it seems that they would have so provided in direct terms. The intention could have been expressed in a few words. Before this contract was executed, it had been held in the *Hotchkin* case that the right was assignable. We will not infer the intention to assign the right, from the reservation of the mutual use of the dock. The language of the reservation in the deed shows, either that the dock was then thought to be wholly or in part upon the upland, or that being used in connection with the upland, it was thought that it might pass as an appurtenance unless some reservation was made.

Respondents' contention, that it can invoke the equitable doctrine of relation, we think is without merit. They cite *Cummings v. Newell*, 86 Minn. 130, 90 N. W. 311; *Krakow*

v. Wille, 125 Wis. 284, 103 N. W. 1121; *Scott v. Sloan*, 72 Kan. 545, 84 Pac. 117, and *Thoraldson v. Hatch*, 87 Minn. 168, 91 N. W. 467. In the *Cummings* case, the owner of a tract of farm land entered into a contract with another to sell him the land, received a payment upon it, executed a deed, and placed it in escrow. Pending the perfecting of the title, the crop was harvested and appropriated by the vendor. In a suit to recover for the value of the crop, it was held that the actual delivery of the deed must be construed as having taken place by relation at the time of its execution, and that the purchaser was entitled to recover. In the *Krakow* case, the owner of the land agreed to convey it to another, upon his making certain payments. The contract provided that the purchaser should have possession of the property. Later the land was regularly conveyed. Between the date of the contract and the execution of the deed, the owner cut and converted into lumber and cord wood a large number of trees which had been standing and growing on the premises, and sold the product and appropriated the proceeds. Applying the doctrine of relation, it was held that the vendor was liable to the purchaser in an action for conversion. The *Scott* case arose out of a transaction identical with that in the *Cummings* case, and it was held that the purchaser was entitled to the rents. In the *Thoraldson* case, it was held that, when a deed is placed in escrow, the title does not pass until the second delivery; but that "this rule is not inflexible, and does not apply where justice and necessity require a resort to fiction. In such cases the deed takes effect by relation from the first delivery, in order that the operation of the deed may not be frustrated by events transpiring between the first and second delivery." In the *Cummings*, *Krakow*, and *Scott* cases, it will be observed that the doctrine of relation was applied so as to protect a right in or arising out of the subject-matter of the contract.

We do not think the case at bar calls for the application of equitable principles. Tide lands, under our former holdings,

are neither a part of, nor an appurtenance to, the uplands. The owner of the legal title to the uplands, at the time when the right must be exercised, is by the grace of the state given the preference right to purchase. The respondents contracted for the purchase of the uplands, and have received all they contracted for. They did not acquire the legal title to the uplands until more than nine months had expired after the filing of the plat of the tide lands. We have not overlooked the oral testimony. The contracts, however, are unambiguous, and the intention of the parties must be ascertained from them.

The judgment is reversed, with directions to affirm the order of the board of state land commissioners.

RUDKIN, MOUNT, and PARKER, JJ., concur.

FULLERTON, J. (dissenting)—I think the judgment of the trial court should be affirmed. I therefore dissent from the judgment directed by the majority.

[No. 8965. Department One. January 17, 1911.]

A. J. PETTICREW *et al.*, *Appellants*, v. BELLE GREENSHIELDS, *Respondent*.[1]

ADVERSE POSSESSION—GOOD FAITH—NECESSITY. The grantee in a quitclaim deed having knowledge that the grantor was a stranger to the title and that the title was vested in another, cannot show good faith or gain title by adverse possession, under Rem. & Bal. Code, § 788, giving title by adverse possession under claim and color of title made in good faith, and the payment of taxes for seven years.

ADVERSE POSSESSION—VACANT LAND—ACTS OF OWNERSHIP. The occasional hauling of wood for domestic use from a tract of 640 acres of land, wholly unoccupied and unimproved, is not such an act of adverse possession as to indicate a claim of title.

[1]Reported in 112 Pac. 749.

DEEDS—DELIVERY—ACCEPTANCE—RATIFICATION. The procuring of a deed from a railroad company by a banker, who looked after the interests of the grantee and made final payment, is a sufficient delivery to the grantee, with acceptance and ratification by him, where he thereafter tried to obtain a statement from the banker and settle with him.

EQUITY — LACHES — QUIETING TITLE — LIMITATION OF ACTIONS. Laches will not prevent the quieting of title to land, if suit is brought within the period of the statute of limitations, if the equities involved do not call for the exercise of the discretion of a court of equity.

Appeal from a judgment of the superior court for Lincoln county, Huneke, J., entered March 16, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

H. J. Hibschman, for appellants.

Sessions & Warren and *Mark F. Mendenhall*, for respondent.

PARKER, J.—This is a suit to quiet title to a section of land in Lincoln county. It was originally commenced by A. J. Petticrew and Anna B. Hamilton as plaintiffs, against Charles Greenshields and others as defendants. Before the trial, Anna B. Hamilton died, and prior to her death she had conveyed her interest in the land to her husband, W. F. Hamilton, who was substituted as plaintiff in her place. The defendant Charles Greenshields conveyed his interest in the land, before the trial, to his daughter Belle Greenshields, when she intervened claiming to be the sole owner of the land. This controversy is now being waged between A. J. Petticrew and W. F. Hamilton, each claiming to be the owner of an undivided half of the land, and Belle Greenshields, claiming to be the sole owner of the land. All questions touching the present rights of the other parties to the cause have been eliminated. A trial upon the merits resulted in a decree in favor of the intervener, Belle Greenshields, decreeing her to be the owner of the land and quieting her title thereto as against the

claims of the plaintiffs, upon condition, however, that she pay to the plaintiffs, within ninety days from March 4, 1910, certain sums found to have been paid out by them and Anna B. Hamilton, on account of purchase price of the land, and taxes. From this decree, the plaintiffs have appealed.

The material facts upon which the rights of the parties depend may be summarized as follows: Charles Greenshields came to Lincoln county from Michigan in the fall of 1888, his object being to purchase land. In November of that year he acquired, by assignment from one Weaver, a contract for the purchase of this land from the Northern Pacific Railway Company, the first payment only having been made thereon. He then returned to Michigan, and came back to Lincoln county in February, 1889. Soon thereafter he was joined by Anna B. Monarch, who lived with him there as his wife, and became there known as Mrs. Greenshields, and some years later became Anna B. Hamilton, the wife of appellant Hamilton. Greenshields and Mrs. Monarch lived on another tract of land in Lincoln county, which had been bought in her name. This is referred to by some of the witnesses as, "her place" or "the home place." When they went to the home place to live, the appellant Petticrew went there to work for Greenshields. In the fall of 1889 Greenshields and Mrs. Monarch had a falling out, when he went away and never returned. Appellant Petticrew stayed and worked for Mrs. Monarch for several years thereafter. Mrs. Monarch conducted her farming business in the name of Anna B Greenshields, and appellant Petticrew acted to a considerabl extent as her agent, attending to the marketing of crop, depositing proceeds thereof in the bank at Davenport, and even signing her name to checks upon the bank. One C. J. May was the cashier of the bank. He looked after some intrests of Greenshields after he went away, and was also a friend and business adviser of Mrs. Monarch. In June, 1891, May paid to the railway company the balance due upon the land contract, when the railway company issued a deed tere-

for in Greenshields' name, delivering it to May. This deed was not recorded until 1907. In the meantime the bank had become insolvent and passed into a receiver's hands, and May became a fugitive from justice. The deed was found thereafter among the bank's papers, and recorded at the instance of Greenshields. Some correspondence between May and Greenshields, about the time of and after the final payment to the railway company by May, convinces us that May made this final payment for Greenshields, whether with funds of his own or with funds of Greenshields is not clear. In any event he then informed Greenshields that he had settled with the railway company, had received "the papers," evidently meaning the deed, and that he would soon send a statement. Greenshields appears to have made efforts to procure a settlement with May thereafter, but was never able to do so.

Prior to the spring of 1899, the land was wholly unimproved and wholly unoccupied. No physical use had ever been made of the land by any one, save appellant Petticrew had occasionally hauled some fire wood from it for Mrs. Monarch for domestic use. The taxes accruing on the land prior to 1899 were paid either by May or the respondent. These payments we think were made for Greenshields. On June 23, 1899, May executed and delivered to Mrs. Monarch a quitclaim deed for the land, reciting a consideration of one dollar. It is claimed that she then paid him $665 for it. This deed is relied upon by appellants as constituting their color of title. Under it and subsequent conveyances from Mrs. Monarch, they claim that she and they have held the physical possession of the land, claiming title thereto in good faith, and paid taxes thereon for a sufficient length of time to perfect their title thereto under the seven-year statute of limitations. At about the time of acquiring this deed, the land was fenced by appellant Petticrew for Mrs. Monarch, he being then still in her employ. It was thereafter used for pasture, and a considerable portion of it was cultivated and crops raised on it by Petticrew for Mrs. Monarch and him-

self, she having deeded to him an undivided half interest therein. The use and possession of the land has, since June 1899, been continuous in Mrs. Monarch, who later became Mrs. Hamilton, and appellants. Since June 1899 the taxes have been paid by Petticrew or Mrs. Hamilton.

It is clear that Petticrew knew that Greenshields owned the land at the time of and prior to the giving of the quitclaim deed by May to Mrs. Monarch. He not only knew this from his conversations with May at that time, but he evidently knew it from his acquaintance and association with Greenshields some years before. The knowledge which Mrs. Monarch had of Greenshields' interest in the land at the time she received the quitclaim deed from May in June, 1899, does not appear by direct and positive evidence; but it seems to us there is sufficient evidence of a circumstantial nature to warrant the conclusion that she did then know of Greenshields' title to the land. Let us notice some of these circumstances. We have noticed that Petticrew was acting as agent for Mrs. Monarch to a considerable extent. He marketed her crops, received and deposited the money therefor, and even paid out money by signing checks for her. The talk he had with May, in which he admitted that he learned of Greenshields' ownership of the land, evidently occurred on the day that May gave the quitclaim deed to Mrs. Monarch. He does not seem to remember whether or not she was present at that conversation, but his testimony renders it highly probable that she was present and learned all that he did at that time as to Greenshields' title, if she did not know it already. Petticrew testified on direct examination, in part, about this conversation, as follows:

"By Mr. Hibschman: Q. Did you say anything further at that time to Mr. May about the payments on the land? A. When they made final payments and made this deed, why she wanted him to send that deed to Greenshields and have it signed to her which he said he did and he wrote back here and said that he would not sign it unless she paid him his first payment back. Q. Now you know this of your own

knowledge? A. Yes. . . . . Q. This is what May told you? A. Yes. . . . . Q. Where were you at the time this conversation took place in which Mr. May told you there was a deed to Greenshields? A. I was in May's bank. Q. Was Mrs. Monarch there? A. I don't remember as she was. Q. Did he say anything more than just tell you there was a deed there from the railroad to Greenshields? A. He said he would sign the deed provided she paid this payment that he had paid and she said she would not do it unless— . . . . A. —Mrs. Monarch said she would not pay that back because her money made the first payment. Q. She said this to May? A. She said it to May and said it to me, and May had told me that. Q. May had told you too? A. Yes. Q. Was that the reason you said a moment ago you thought the land belonged to Mrs. Greenshields? A. Yes. Q. Did May say anything as to whether or not the deed to Greenshields had been recorded? A. He said it had never been recorded. Q. Did he say why not? A. No, he did not. Q. Did he tell you why he happened to have it? A. He said because there were several payments and the deed was to go to him. When the railroad deed was issued he got it and he said he had an equity of it at that time."

On cross-examination Petticrew testified in part as follows:

"A. I brought the checks into the bank and Mrs. Greenshields was there. Q. Mrs. Greenshields was there? A. She was there and got the deed. Q. Was Mrs. Greenshields there when you took that money there? A. She certainly was. Q. Mrs. Monarch? A. Yes. Q. Didn't you say a moment ago that she was not there when you brought the money for Mrs. Greenshields and put it in the bank. She was in there at that time? A. She was at the bank. . . . . Q. You say now that Mrs. Monarch was there? A. On the date she got the deed. Q. I mean the day you sold the crop you testified about awhile ago? A. The same date."

The intimate relations existing between Mrs. Monarch and Greenshields after he had acquired the contract for this land also indicates that she knew of his claim to it. Petticrew and Mrs. Monarch may have had some reason for believing

that May had some claim upon the land to secure the repayment of money advanced by him for Greenshields, but we cannot escape the belief that they both knew that May had no title to or right to convey the land, as he then attempted to do by the quitclaim deed to Mrs. Monarch.

The principal contention of learned counsel for appellants is that they have acquired title to this land by actual possession under claim and color of title made in good faith, under the seven-year statute of limitations, which provides:

"Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title." Rem. & Bal. Code, § 788.

It may be conceded that the quitclaim deed from May to Mrs. Monarch, under which appellants claim, constitutes upon its face color of title, and that the possession thereunder and the payment of taxes has extended over the period of seven years. The only remaining question under this contention then is that of the good faith of Mrs. Monarch and Petticrew in acquiring the quitclaim deed from May and making their claim of title thereunder. This question depends upon the knowledge possessed by them at the time of procuring this deed on June 23, 1899, touching the right and title of the real owner of the land at that time. We have seen that Greenshields was then the owner, that May had no right whatever to convey the land, and that Mrs. Monarch and Petticrew then knew these facts. This renders the law of this branch of the case comparatively a simple matter. In the case *of Brodack v. Morsbach*, 38 Wash. 72, 80 Pac. 275, discussing this seven-year statute, we said:

"While under the general statute of limitations the elements of good faith may not enter into the claim of the party

holding adversely, yet the appellants are claiming under a special statute which makes the *bona fides* of their claim a prerequisite to a recovery. Under this statute a mere notice of an adverse claim, which the party in possession believes in good faith to be ill-founded, will not bar a recovery, but when, as in this case, the parties claiming by adverse possession have actual notice that there is an adverse claim to the property, or an interest therein, and that such claim is superior and paramount to the claim or interest which they acquire under their paper title, their possession is not 'under claim and color of title, made in good faith.' *Arnold v. Woodward*, 14 Colo. 164, 23 Pac. 444; *Latta v. Clifford*, 47 Fed. 614; *Hunt v. Dunn*, 74 Ga. 120; *Templet v. Baker*, 12 La. Ann. 658."

See, also, *May v. Sutherlin*, 41 Wash. 609, 84 Pac. 585; *Compton v. Newton*, 129 Ga. 619, 59 S. E. 270; *Jasperson v. Scharnikow*, 150 Fed. 571, 15 L. R. A. (N. S.) 1178, 1248 note; *Power v. Kitching*, 10 N. D. 254, 86 N. W. 737, 88 Am. St. 691, 716, note.

We are of the opinion that appellants' claims to this land are not made in good faith within the meaning of this statute, and hence have not ripened into title, though their possession and payment of taxes appears to have covered a period of more than seven years.

Some contention is made that appellants have acquired title by adverse possession under the ten-year statute. But clearly ten years did not elapse from the commencement of the actual physical possession of Mrs. Monarch to the filing of respondent's complaint in intervention, which, for the purpose of this inquiry, may be considered the commencement of her action to recover the land. The exercising of the alleged acts of ownership by Petticrew and Mrs. Monarch prior to the spring of 1899, about the date of the quitclaim deed from May, in no event consisted of anything but an occasional hauling of wood for domestic use, from the land. This was clearly not such an act of adverse possession as to indicate that they were claiming title to this large tract of land consisting of six hundred and forty acres.

It is contended that Greenshields never accepted the deed from the railway company, and for that reason never acquired title to the land. We think the relationship existing between May and Greenshields fully warrants the conclusion that May procured the deed for Greenshields, that Greenshields ratified May's acts in procuring the deed, and thereafter tried to procure a statement from and settle with May on account of the money paid by May to the railway company.

It is contended that Greenshields and his daughter, the respondent, have been guilty of such laches in asserting their right to this land as to preclude recovery in this action. We are unable to see any sound reason for the application of the doctrine of laches to this controversy. The legislature has fixed the limit of time by statutes of limitation, within which rights may be asserted such as respondent here claims by her intervention. The period so fixed by statute had not expired when she intervened. The equities here involved do not, in our opinion, call for the exercise of that discretion of a court of equity sometimes exercised in its refusal to enforce claims which may not be technically barred by statutes of limitation.

On the question of the amount of money required by the decree to be paid to appellants by respondent on account of purchase price paid by Mrs. Monarch to May, and on account of taxes paid since then, we think the learned trial court had done them full justice, especially in view of the use which Petticrew and Mrs. Monarch had of the land for several years. We are of the opinion that the rights of the parties have been properly determined. The judgment is affirmed, with directions to allow respondent ninety days from the filing of the remittitur upon this decision in the superior court to pay the sums awarded to appellants by that court.

RUDKIN, MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 8932. Department Two. January 20, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Christian Brunn, Appellant*, v. THE STATE BOARD OF MEDICAL EXAMINERS, *Respondent*.[1]

PHYSICIANS—LICENSE TO PRACTICE—PROCEEDINGS—APPEAL. Appeal lies from the order of the board of medical examiners refusing a license to practice, under Rem. & Bal. Code, § 8399.

MANDAMUS—WHEN LIES—ADEQUATE REMEDY BY APPEAL. Mandamus does not lie to review the action of the board of medical examiners in refusing a license to practice, there being an adequate remedy by appeal, under Rem. & Bal. Code, § 8399.

SAME. The adequacy of the remedy by appeal is not affected by the failure of the party to avail himself thereof within the statutory period.

Appeal from an order of the superior court for King county, Gay, J., entered February 23, 1910, upon sustaining a demurrer to the affidavit, dismissing an application for a writ of mandamus. Affirmed.

Pruyn, Streff & Hoeffler and *Milo A. Root*, for appellant.

Howard G. Cosgrove and *Higgins, Hall & Halverstadt*, for respondent.

CROW, J.—Christian Brunn applied to the superior court of King county for a writ of mandamus directed to the board of medical examiners of the state of Washington, compelling it to issue a license to him to practice osteopathy. In his amended affidavit he alleged, that for more than seven years prior to March 18, 1909, he had been continuously treating the sick and afflicted under the system and method of osteopathy, within this state, being located at and residing in Ellensburg for more than three years last past; that more than two weeks prior to July 6, 1909, he made due appli-

[1]Reported in 112 Pac. 746.

cation to the board of state medical examiners for a license to practice osteopathy, furnishing all required evidence; that the board refused him a license, by its decision filed and entered in the following words:

"The board of medical examiners of the state of Washington in regular session having duly considered the application of Christian Brunn for a license from said board to practice osteopathy in said state, does hereby refuse to grant said license for the reason that the said Christian Brunn did not file any osteopathic diploma with this board or its secretary as provided by law. Dated this 10th day of July, 1909;"

that the relator was not by law required to file any such diploma, and that no other reason for refusing a license was assigned by the board. To this amended affidavit the board interposed a demurrer, which was sustained. Thereupon the relator refused to plead further, and has appealed from an order dismissing his application.

It is conceded that no appeal was taken from the order of the board refusing the license, and the controlling questions now before us are whether the appellant had a complete and adequate remedy by appeal from the order of the board, and if he had, whether mandamus will lie to compel the issuance of a license. There can be no doubt but that the first question must be answered in the affirmative. The right of appeal was expressly granted by Rem. & Bal. Code, § 8399, the same to be taken within thirty days after the filing of the decision of the board. This court has sustained such right of appeal. *In re Littlefield, ante* p. 150, 112 Pac. 234.

It is a well established doctrine, repeatedly recognized and announced by this court, that mandamus will not lie in favor of a relator who has an adequate remedy at law, by appeal or otherwise. Section 8399, *supra*, provides for a trial *de novo*, on appeal from the order of the board, and such a trial *de novo* would secure to a complaining party as complete an investigation and as adequate a remedy as could possibly be obtained in a mandamus proceeding. It is mani-

fest that the appellant was afforded an adequate remedy by appeal, had he sought the same within the statutory period. This being true, he cannot now obtain relief by mandamus. In *State ex rel. Young v. Denny*, 34 Wash. 56, 74 Pac. 1021, this court, citing numerous authorities, said:

"It is urged that an appeal will not afford a sufficiently speedy and adequate remedy, for which reason review by certiorari is sought. It has been the uniform rule of this court to deny the writ of certiorari, and the other extraordinary writs of mandamus and prohibition, when it appeared that there was an adequate remedy by appeal. It has also been determined that the delays and annoyances incident to an appeal do not affect the adequacy thereof."

See, also, *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207; *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 395; *State ex rel. Gillette v. Clausen*, 44 Wash. 487, 87 Pac. 498; *State ex rel. LaFurgey v. Superior Court*, 47 Wash. 154, 91 Pac. 639.

The order of the board refusing the license was made and entered on July 10, 1909. Appellant in his brief concedes that more than sixty days thereafter, he filed his original affidavit in this proceeding to obtain a writ of mandamus. His time for appeal had then expired. He now contends that as no remedy by appeal now remains to him, he should obtain a writ, insisting that his license was illegally refused. The adequacy of his remedy by appeal cannot be affected by his failure to avail himself of such remedy within the statutory period. In *State ex rel. Washington Dredg. & Imp. Co. v. Moore*, 21 Wash. 629, 59 Pac. 505, we said:

"The order of the court, then, being appealable, under the decisions of this court in *State ex rel. Light Co. v. Superior Court*, 20 Wash. 502 (55 Pac. 933), and *State ex rel. Vincent v. Superior Court*, filed November 15, 1899, *ante*, p. 571, the action for mandamus will not lie, whether the court was acting with or without jurisdiction. Of course, the fact that the appeal is not available to the relator now cannot

be taken into consideration, as it was through his fault that the appeal to which he was originally entitled failed."

The judgment is affirmed.

DUNBAR, C. J., RUDKIN, CHADWICK, and MORRIS, JJ., concur.

[No. 9288. Department Two. January 20, 1911.]

A. S. CROWDER, *Appellant*, v. W. J. MORPHY *et al.*, *Respondents*.[1]

LIMITATION OF ACTIONS—TOLLING STATUTE—ABSENCE. The statute of limitations is not tolled by absence of the debtor from the state, where his business kept him out of the state only part of the time, and at all times he maintained a home in this state at which his wife and children resided, and where service of process could have been made under Rem. & Bal. Code, § 226, regardless of any distinction between domicile and residence.

LIMITATION OF ACTIONS—BAR OF PRINCIPAL DEBT—ANNUAL INSTALLMENTS OF INTEREST. A contract for annual installments of interest is merged in the judgment thereon, and the statute of limitations running against the judgment bars any recovery for annual interest on the contract or judgment.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered June 25, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on a judgment. Affirmed.

John C. Stallcup and *J. W. A. Nichols*, for appellant.

CHADWICK, J.—This action was brought on a judgment entered December 11, 1893, in favor of plaintiff and against defendant W. J. Morphy. No part of the judgment has ever been paid. This action was begun on the 19th day of

[1]Reported in 112 Pac. 742.

April, 1907. It is alleged in the complaint that, some time during the year 1897, respondent W. J. Morphy left the state of Washington and became a resident of the city of Chicago, in the state of Illinois; that the judgment was taken upon a community debt, and that defendants have accumulated a large amount of property in Pierce county which is properly chargeable with the judgment. The prayer of plaintiff's complaint is for the original indebtedness and accumulated interest, and for equitable relief. The trial judge found that respondents had continued to reside in this state until after the statute of limitations had run, and accordingly gave judgment for the defendants.

The testimony fairly shows that, while respondent W. J. Morphy had business which kept him out of the state of Washington to some extent between the years 1897, and August, 1900, he was in the state a part, if not the greater part, of the time; that he maintained a home at which his wife and children resided at all times, either in Seattle or Tacoma, and that service could have been had under the statute at any time prior to August 15, 1900. Counsel seek to draw a distinction between domicile and residence. While the discussion is engaging, it can have no bearing on this case, the question being fully covered by the statute, Rem. & Bal. Code, § 226. The whereabouts of the husband is wholly immaterial, so long as a home is maintained at which service may be made, when it appears that his absence was of a temporary or casual nature; the better rule being that the statute will operate without the saving clause if process might be served.

"If the defendant is domiciled or resident within the state, although he may be temporarily absent therefrom, provision is made by our laws, by which the plaintiff may commence a personal action against him, in which a judgment may be obtained, which will be binding and conclusive between the parties to all intents and purposes; and therefore, in such a

case, no saving of the right of the plaintiff to commence such suit is necessary." *Sage v. Hawley*, 16 Conn. 106.

See, also, *Penley v. Waterhouse*, 1 Iowa 498; *Blodgett v. Utley*, 4 Neb. 25.

It is further contended that, although the principal debt be barred by the statute, the interest being payable annually under the original contract, appellant should have had judgment for the annual installments of interest accruing within six years prior to August 15, 1900. *Amy v. Dubuque*, 98 U. S. 470; *Koshkonong v. Burton*, 104 U. S. 668, and 25 Cyc. 1103, are cited to sustain the proposition that, where interest is payable in installments, an independent action may be brought, and where the interest is evidenced by coupon notes, they become independent obligations and fix the time for the running of the statute from the date of their own maturity. It is argued that, in principle, these authorities govern here; but this action is brought on the judgment and not on the contract. When the original action was brought, the contract was merged in the judgment, and the interest became a statutory incident only. The statute having run against the judgment, we know of no rule that would save the interest or any part thereof.

Judgment affirmed.

DUNBAR, C. J., RUDKIN, MORRIS, and CROW, JJ., concur.

[No. 9319. Department Two. January 20, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. MAT LETICA, *Appellant*.[1]

INDICTMENT AND INFORMATION—DEGREES OF OFFENSE INCLUDED—ASSAULT. An information charging first degree assault with intent to kill by stabbing with a knife sustains a conviction for second degree assault with intent to do "grievous bodily harm," or that the "weapon or other instrument or thing was likely to produce bodily harm," under Rem. & Bal. Code, § 2414.

CRIMINAL LAW—SELF-DEFENSE—INSTRUCTIONS—APPEAL—HARMLESS ERROR. In a charge on the subject of self-defense, the inapt use of the expression "justified by necessity," is not reversible error where the instruction, considered as a whole in the light of other instructions, fairly states the law, although if considered alone it might be prejudicial.

CRIMINAL LAW—APPEAL—INSTRUCTIONS—HARMLESS ERROR. A needlessly long instruction will not be held prejudicial, as a matter of law, as singling out the evidence of the accused, when the appellate court is unaided by the evidence and the instruction appears correct in the abstract.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 7, 1910, upon a conviction of assault in the second degree, after a trial upon an information charging assault in the first degree. Affirmed.

R. L. Sherrill and *Gordon & Askren*, for appellant.

J. L. McMurray, *A. O. Burmeister*, and *F. G. Remann*, for respondent.

CHADWICK, J.—Defendant was charged with the crime of an assault in the first degree. The charging part of the information is as follows:

"That the said Mat Letica, in the county of Pierce, in the state of Washington, on or about the 19th day of June, nineteen hundred and ten, then and there being unlawfully and feloniously did then and there with intent to kill one Paul

[1]Reported in 112 Pac. 748.

Viskich, by means likely to produce death, namely—by stabbing him, the said Paul Viskich, with a knife."

From a verdict and judgment of conviction of assault in the second degree, the defendant has appealed, and by timely exception to the instructions, has raised the following questions for our decision:

(1) That the information is not sufficient to charge an assault in the second degree, in that it does not charge that "grievous bodily harm" was inflicted, as required by subdivision 3, § 2414, Rem. & Bal. Code, nor that the assault was a wilful assault with a "weapon or other instrument or thing likely to produce bodily harm," as required by subdivision 4 of the same section. The case is brought here on a short record, and we cannot say that the defendant is not guilty of the crime of assault in the second degree, as was held in the case of *State v. Kruger*, 60 Wash. 542, 111 Pac. 769, which is cited and relied on by appellant. The information in this case seems to us to be clearly broad enough to comprehend the included crime of assault in the second degree. The charge of assault with intent to kill by stabbing with a knife, an instrument likely to produce death, is equivalent to, if not comprehensive of, an assault with intent to do "grievous bodily harm;" and a charge that the "weapon or other instrument or thing [was] likely to produce bodily harm."

(2) The cutting was admitted and the plea of self-defense interposed. When instructing the jury upon this defense, the court said, "unless you first find that the use of the weapon or means likely to produce death shall justify either the necessity or apparent necessity to preserve his own life," etc., the plea should be disregarded. It is admitted that, in other instructions, the law was correctly given to the jury, but that line of authority holding that "it is no answer to the objection that an erroneous instruction was given, for the prosecution to show that in another part of the charge another instruction was given in which the law was correctly

stated," is cited to sustain the charge of error. Where there are two instructions, the one opposed to the other in principle and submitting two conflicting theories of law, the result may be such as to require a reversal; but where an instruction is given, as in this case, which, considered as a whole and in the light of other instructions, fairly states the law, this court has adopted the rule that it will not detach a sentence or paragraph which, when considered alone, might be prejudicial, and reverse the case for that reason. The use of the expression "justified by necessity" was inapt, but under the rule declared in *Hoseth v. Preston Mill Co.*, 49 Wash. 682, 96 Pac. 423, and *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25, will not be held to be error warranting a reversal of the case.

(3) It is finally contended that the court, in instructing the jury as to the credit to be given to the testimony of the witnesses, singled out and made the testimony of appellant unduly prominent. The instruction complained of is unnecessarily long, and bears the vice of needless repetition. But passing upon it in the abstract, unaided by the light the evidence might throw upon it, we are unwilling to say it was prejudicial as a matter of law. An instruction of somewhat the same character was by this court allowed to pass the test of the law. *State v. Melvern*, 32 Wash. 7, 72 Pac. 489.

Judgment affirmed.

DUNBAR, C. J., RUDKIN, MORRIS, and CROW, JJ., concur.

[No. 9334. Department Two. January 20, 1911.]

JOHN M. DEMPSEY, *Appellant*, v. MARY L. DEMPSEY, *Respondent*.[1]

MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE. A deed may be shown by parol to have been intended as a mortgage, but the evidence must be clear, cogent, and convincing.

WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEASED. A widow, the defendant in an action to quiet title, cannot testify to statements made by her deceased husband as to his interest in the property in dispute; since she is a party in interest and to the record, within Rem. & Bal. Code, § 1211, prohibiting such a party from testifying to transactions with the deceased.

EVIDENCE—SELF-SERVING DECLARATIONS. In an action against a widow to quiet title, evidence of declarations to third persons by her deceased husband as to his interest in the property are inadmissible as self-serving.

SAME—DECLARATIONS—ADMISSIONS AGAINST INTEREST. A declaration by a father, at the time of the purchase of property in his son's name, that the deed was so taken to secure advances made to him by the son, must be measured in the light of the whole transaction, and is not necessarily a declaration against interest merely because it shows an indebtedness.

MORTGAGES — ABSOLUTE DEED AS MORTGAGE—EVIDENCE—SUFFICIENCY. Where property was purchased in the name of a son, and the father built a house and lived on the property, the fact that the deed to the son was not recorded and was kept in the possession of the father until his death is not sufficient to overcome the presumption that the deed speaks its true intent and was not intended as a mortgage to secure advances made by the son .

EVIDENCE—RES GESTAE—WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. Where the statute renders incompetent the evidence of declarations by a deceased person respecting his title to the property in dispute, it cannot be received as a part of the *res gestae*.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered August 2, 1910, upon findings in favor of the defendant, after a trial on the merits

[1]Reported in 112 Pac. 755.

before the court without a jury, in an action to quiet title. Reversed.

Geo. H. Funk, for appellant.

Troy & Sturdevant and *Gordon Mackay*, for respondent.

CHADWICK, J.—Patrick Dempsey married respondent on February 17, 1908. They lived together until the time of his death, which occurred on October 27, 1908. Patrick Dempsey, so far as the testimony shows, had but little available property, although he was the owner of an undivided interest in 320 acres of land situate in Thurston county, yielding a rental return of $35 or $40 a month, all of which was used by him with the consent of his cotenants, two sons by a former marriage, one of whom is the appellant. In June, 1908, appellant gave Patrick Dempsey $540. The purpose of this advance was to enable the elder Dempsey to purchase a lot in the city of Olympia upon which he might build a home. This he did, paying for the lot $475 out of the money advanced by appellant. The deed was made to the appellant, as grantee, and was probably retained by Patrick Dempsey up to the time of his death. The deed was afterwards recorded by appellant. The erection of a dwelling house upon the lot so purchased was begun about July 4, 1908. Pending its construction, appellant advanced $85, and later Patrick Dempsey and his two sons executed a mortgage upon a part of the 320-acre tract, for the sum of $1,400. This sum with the previous advances met the whole cost of the lot and building, unless it be that respondent paid for clearing and grading a part of the lot, at some cost the exact amount of which is left uncertain, but is admittedly under $50. After the death of Patrick Dempsey, respondent continued to remain in possession of the property, and in March, 1909, filed a declaration of homestead thereon. Appellant has paid the taxes, and in furtherance of his claim of ownership, says—and in this he is sustained by his brother—that as between him

and his brother and his father, he was to assume and pay the mortgage out of his own earnings.

It is the theory and claim of appellant that the property was purchased and the house erected pursuant to an understanding that the property was to be his property, with a right of occupation in his father during his lifetime. Respondent contending, and the lower court holding, that the purchase price of the lot was advanced as a loan, a decree was accordingly entered, establishing a lien for the sum of $475, and $33.70 taxes, and directing the execution of a quitclaim deed.

It may be set down as a premise, from which a correct judgment must flow, that a deed regular in form is presumptive evidence of the highest character that it voices the intention of the parties. Devlin, Deeds (2d ed.), § 1136. This court, acting in harmony with that sentiment that would arrive at the truth of each controversy, has rejected from the first the common-law rule that testimony would not be received to show a deed to be in fact a mortgage, as well as the earlier rule of the chancery courts that it would only be received to show a fraud or mistake, and declared that the true intent of the parties may be shown by any competent testimony; but in such cases the evidence relied upon should be of the most clear, cogent, and convincing character. *Dabney v. Smith*, 38 Wash. 40, 80 Pac. 199; *Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579. However, evidence is a means to ascertain the truth, and where declarations of a deceased person are involved, rules have been declared by statute, for it is as important that the truth be protected as it is that it be declared.

As against the form of the deed, respondent relies upon statements made by Patrick Dempsey to her, and to the scrivener who made out the deed, and to her daughter. These statements are to the general effect that the property was to be his, that the advance was in fact a loan, and that the property was of a community character, being intended for

a home for himself and wife. In no instance was appellant present at the time these declarations are said to have been made. Nor are any circumstances shown that would bind appellant to the acknowledgment of anything testified to by these witnesses. The testimony of respondent is clearly incompetent under the statute. Rem. & Bal. Code, § 1211. She is not only a party to the record, but is also a party in interest. The testimony of third persons tending to prove declarations on the part of the deceased must likewise be rejected, for the reason that they are self-serving and therefore incompetent; or to restate the proposition, they would not be competent if Patrick Dempsey were alive and a party to the action; hence, cannot be received after his death. Testimony cannot be given a higher degree of credit than it is entitled to because of the death of a party in interest.

Counsel for respondent contends that statements made at the time the deed was executed were at least declarations against interest, and should be received because they show that deceased had become the debtor of appellant. But this declaration of indebtedness, if received, must be measured in the light of the whole transaction, and the most that could be claimed for it is that it would raise a doubt. In such cases the doubt is resolved in favor of the deed as written, under the rule requiring clear and convincing evidence, and the statements, if held to be competent, would be unavailing to respondent. Nor do we think, considering the same rule, that the fact that the deed was kept in the possession of Patrick Dempsey is sufficient to overcome the presumption that the deed speaks its true intent. It is a circumstance, but if true it would not be inconsistent with the lodgment of title in appellant.

Counsel further insist that the declarations of Patrick Dempsey should be received as a part of the *res gestae*. We do not understand the rule of *res gestae* to apply, when the transactions and declarations of deceased persons are under scrutiny, to the extent of overcoming the statute which would

otherwise exclude the evidence. We have given no heed to the testimony of the same character offered by appellant, but it may be pertinent to say that, if all of the declarations offered by respondent be received, they are met by like declarations testified to by appellant and his witnesses. So that, if the testimony on either side were competent, we would be brought back to the original proposition that the deed will not be held to be a mortgage where the testimony is doubtful or conflicting.

The judgment of the lower court is reversed, and the cause remanded with instructions to enter such decree as may be consistent with this opinion.

DUNBAR, C. J., RUDKIN, MORRIS, and CROW, JJ., concur.

[No. 8896. Department Two. January 20, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. FREDERICK WILLIAM JAHNS, *Appellant*.[1]

HOMICIDE—MURDER IN FIRST DEGREE — INDICTMENT AND INFORMATION—SUFFICIENCY. An information charging that the accused did, with premeditated design to effect her death, kill and murder A. J. by beating and mortally wounding, etc., follows the language of Rem. & Bal. Code, § 2392, defining murder in the first degree, and is sufficient without further alleging that the person died.

JURY—COMPETENCY—CHALLENGES — WAIVER OF OBJECTION. Error, if any, in denying a challenge to a juror for actual bias, is waived, where the state withdrew its opposition, and the court offered to permit the defense to again exercise its challenge, the defense refusing to avail itself thereof or take any action thereon.

JURY—QUALIFICATION OF JUROR—TAXPAYER. Under Rem. & Bal. Code, § 94, an elector and taxpayer of the state of Washington is a qualified juror, and a juror need not be a taxpayer within the county in which he is called.

[1]Reported in 112 Pac. 747.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered January 24, 1910, upon a trial and conviction of murder in the first degree. Affirmed.

H. N. Martin and *Jesseph & Grinstead*, for appellant.

H. G. Kirkpatrick and *Merritt, Oswald & Merritt*, for respondent.

Morris, J.—Appeal from a conviction of murder in the first degree. The first assignment of error is insufficiency of the information, in that it does not allege that the person upon whom the crime is charged to have been committed died as a result thereof. The language of the information touching this point is, "did then and there unlawfully and feloniously, and with a premeditated design to effect her death, kill and murder Agnes Jensen, by then and there unlawfully and feloniously and with a premeditated design to effect the death of the said Agnes Jensen as aforesaid, beating and mortally wounding the said Agnes Jensen." Rem. & Bal. Code, § 2392, defines murder in the first degree, in part, as follows:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either (1) with a premeditated design to effect the death of the person killed."

The information followed the statute in defining the crime charged, and was sufficient.

The information is also attacked upon the ground that it is verified upon information and belief. We do not so find it. The verifying clause is "that the foregoing information is true."

The other assignments are in relation to jurors. Juror Field was challenged upon the ground that he had a fixed opinion as to the guilt or innocence of the accused, requiring evidence to remove. The record discloses that the juror was questioned touching any opinion he might have as to the guilt or innocence of the defendant, based upon what he had

heard or read; to which he answered, he had none. He was then asked if he believed a woman was murdered in Stevens county on October 28. He answered, "Yes, I do believe that;" and further answered that it would take evidence to remove that belief from his mind; that such an opinion was not a fixed opinion or belief, but "is an impression" which would readily yield to the evidence, and that he could render as impartial a verdict as if he had never read of the case before. Thereupon, the state resisting, the court denied defendant's challenge to the juror upon the ground of actual bias. Subsequently the state, doubtless desiring to eliminate any possibility of error from the case, withdrew its opposition to the challenge, and the court then offered to permit the defense to again exercise its challenge to this juror, if desired, which offer the defense refused to avail itself of, and would only answer, "We refuse to say whether we do or not." Whereupon the trial proceeded with the juror in the box; the defense refusing to again challenge the juror for cause, or to exercise a peremptory challenge upon him. We find no error in this situation. If the first ruling of the court was wrong, it was withdrawn for the benefit of defendant, and in refusing to take advantage of the court's ruling and interpose a challenge to the juror, and error in the first ruling was waived and cannot now be taken advantage of.

It is next urged that juror Warner was not a qualified juror, in that it appeared by affidavit upon a motion for a new trial, that he was not a taxpayer in Stevens county. The examination of the juror on his *voir dire* disclosed that he was an elector and taxpayer in the state of Washington, paid no taxes on real property, but did pay taxes on personal property. Under Rem. & Bal. Code, § 94, "An elector and taxpayer of the state of Washington" is a qualified juror; and it appearing that the juror did pay taxes within the state, he was qualified. There is no requirement that a juror, to be qualified as such, must be a taxpayer within the county

in which he may be called. The payment of taxes within the state is sufficient.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., RUDKIN, CROW, and CHADWICK, JJ., concur.

[No. 8988. Department One. January 20, 1911.]

GILBERT GIBSON, *Appellant*, v. CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, *Respondent*.[1]

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—ASSURANCE—EVIDENCE. Where the foreman of railroad construction work, after a blast and complaint of loose rock, inspected the face of a rock ledge, supervised the barring down of loose rock, and informed tunnel men, who could not see the whole face of the ledge, that the place was safe, they had a right to rely thereon, and the fall of loose rock shortly thereafter is some evidence of negligence on the part of the foreman, it appearing that the place might have been made safe.

SAME—EVIDENCE—SUFFICIENCY—TRIAL—TAKING CASE FROM JURY. In such a case, the testimony of the foreman to the effect that the barring down of the loose rock was carefully done, does not warrant the court in deciding, as a matter of law, that due care had been exercised; since the foreman is an interested witness and the question is for the jury.

MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE—DUTY TO INDEPENDENT CONTRACTOR. Where defendant's foreman undertook to render a working place in the side of a ledge safe from falling rock, and reported that the same was safe, the defendant is liable to men working there injured by reason of falling rock and reliance on the foreman's assurance, whether they were working as employees of the defendant or as independent contractors on the tunnel.

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—PLEADINGS—COMPLAINT. A complaint for personal injuries need not specifically allege that the defendants knew, and that plaintiff was ignorant of, the dangers of the working place, where these facts are to be inferred from the facts alleged.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 27, 1910, upon with-

[1]Reported in 112 Pac. 919.

drawing the case from the consideration of the jury, dismissing an action for personal injuries sustained by an employee in railroad construction work. Reversed.

B. M. Branford, for appellant.

F. M. Dudley (H. M. Field, of counsel), for respondent.

PARKER, J.—This is an action to recover damages for personal injuries. The negligence of the defendant and the injuries resulting to the plaintiff therefrom are alleged in his complaint as follows:

"That on the 16th day of September, 1909, and for some time prior thereto, the plaintiff was in the employ of the defendant and working upon the construction of said defendant's railway in camp number 75, near bridge number 17, about one and one-half miles west of Falcon, Idaho, a small station on defendant's railway; that said plaintiff was, at the said time, working as a laborer under the direction and supervision of said defendant, and that said defendant directed the said plaintiff to go and shovel away a quantity of loose dirt which had fallen down from the embankment above, and became lodged in front or at the opening of a 'coyote hole,' the latter being a hole which was made in the hillside, for the purpose of blasting loose dirt and rock to be removed in the construction of a roadbed for said defendant's railroad, and that the defendant assured said plaintiff that the said place where said plaintiff was directed to work was safe, and particularly assured said plaintiff that there was no danger of rocks falling down from the embankment above at the place where said plaintiff was directed to work. That in pursuance to the said order and direction on the part of the said defendant, the said plaintiff, relying upon the statement and assurance of said defendant that the said place was safe, went to work to shovel dirt at the said place as directed.

"That about 11 o'clock on the forenoon of said day, while said plaintiff was working for said defendant at the said place as directed, without any notice or knowledge of any danger whatsoever, and without any fault on the part of said plaintiff, a large rock rolled down over the edge of the embankment about fifty feet above where the plaintiff was at work,

and came down with great force and velocity and struck plaintiff's right arm about four or five inches above the wrist, then and there and thereby breaking the bone known as the ulna in the said plaintiff's right arm and caused what is commonly known and termed as compound fracture of the said bone, and injured the skin, nerves, tendons, muscles and ligaments of the said plaintiff's right arm, and then and there and thereby the said plaintiff's right arm, was seriously and permanently injured and disabled.

"That at all times herein mentioned it was the duty of said defendant to furnish to said plaintiff a safe place to work, and particularly to see that there were no loose rocks in or on the embankment above, which could fall down upon the plaintiff at the said place of work, and that said defendant carelessly and negligently failed to make the said place safe, and failed to remove from the said embankment loose rocks, and failed to warn and notify said plaintiff of said danger, but assured said plaintiff that said place had been made and was safe and then violated its duty to plaintiff, and that by reason of said negligence on the part of said defendant, the injuries set forth were inflicted upon said plaintiff without any fault on his part."

The defendant demurred to the complaint upon the sole ground that it does not state facts sufficient to constitute a cause of action. This demurrer was overruled by the court and the defendant answered, denying the acts of negligence charged against it; and as affirmative defense, alleged that, in the performance of his work at the time of his injury, the plaintiff was not a servant of the defendant, but was an independent contractor; that he assumed the risk of being injured in the manner alleged; and that his injuries were the result of his own negligence. Upon these issues, the cause proceeded to trial. At the conclusion of the plaintiff's evidence, counsel for the defendant challenged the sufficiency of the evidence to warrant the submission of the cause to the jury, which was by the court overruled. At the conclusion of all of the evidence, counsel for the defendant renewed their challenge to the evidence, and moved the court to dis-

charge the jury and enter judgment in favor of the defendant, which motion was granted. From this disposition of the case, the plaintiff has appealed to this court.

The contentions of learned counsel for the respective parties have to do with these questions: (1) Was the evidence bearing upon respondent's negligence and appellant's assumption of risk such as to require the submission of these questions to the jury? (2) Was respondent freed from liability for appellant's injuries because he was performing his work as an independent contractor? We will now review the facts bearing upon these questions.

There was competent evidence tending to show the following: In September, 1909, respondent was engaged in removing a rock bluff incident to the construction of its railway. In the performance of this work, small tunnels, called "coyote holes", were run into the face of the bluff some twenty feet or more at a level of about two hundred feet above the foot of the bluff, in which tunnels large quantities of powder would be exploded, breaking and loosening the rock over the tunnels so that is could be removed by a steam shovel and a small construction train. At the time in question, a ledge had been made along the bluff where the tunnels were being driven, some twenty feet or more wide, on which the train could run upon a temporary track. From this ledge, at the point where appellant was injured, the rock wall of the bluff raised almost perpendicular about thirty-five feet, and then sloped back precipitously until it attained a height of a hundred feet or more. It was composed of rock, seamed horizontally from eight inches to three feet apart, which dipped into the hill. The tunnels were driven in on a level with the ledge, and were on an average of about forty feet apart. The upper part of the bluff was covered with about a foot of earth, except in some few places the rock came to the surface. This extended down to within about sixty feet of the ledge, probably down to where the earth and surface rock had been removed in making the ledge. A person standing on the ledge

could not see near all of the wall and slope above him. On Saturday, September 11, appellant, and two other men associated with him, applied for work to Mr. Horrocks, the engineer in charge of the construction of respondent's railway. They were all experienced rock workers. It is clear that they then made arrangements with Horrocks to go to work for respondent, though there is a dispute as to the exact nature of their contract. Appellant testified:

"Q. State when if at any time you were hired by the defendant in this case, the Chicago & Milwaukee Railway Company, to work for them. A. Why I was hired at the east portal by an assistant engineer by the name of Horrocks, and he gives me a slip of paper to take over to his foreman by the name of Dan McKinnon, and get the orders from him what to do. We were hired to go over there and do rock work, to get orders from him to work, or what to do. Q. Did the defendant hire anyone else besides you at this time to go to this place to work? A. There was three of us hired, I and Anderson and Hans Christopherson. The three of us was hired to go to this place and do rock work. Q. Now where is this east portal that you were hired at? A. I couldn't say exactly how many miles to it. It is in the neighborhood —or at least I was told by Mr. Horrocks there that it should be seven or eight miles. It is about seven miles, I think, as far as I can remember. Q. From the camp where you were to work? A. From east portal to this camp where I went to work. I don't remember that particular or exactly, but my recollection is that Horrocks told me I could make it by walking over there in seven miles, he says. Q. Did you walk over? A. No, sir, we took the train in the evening and went over. Q. What was your agreement as to wages with Mr. Horrocks? A. Well, we were told that we should get three dollars seventy-five a foot for digging this coyote hole, and any other day work that was mentioned how much we should get a day for that."

On cross-examination he testified:

"Q. Now, tell us what you first said to Mr. Horrocks when you met him. A. I asked him if he had any work to let out, or any work to give to anybody; we were looking for work. He says he had some coyote hole digging over there, he said;

and he says, contract work or day work. He says, 'You can get it on contract', he says. And I asked him how much he was paying. He says, 'Three dollars seventy-five a foot. So if you want to go over there and look at it,' he says, 'you can go over and take that one particular hole,' he says, 'if it suits you. If it don't, see the foreman and you will get something else.' "

This testimony tends to show the authority of the foreman McKinnon, as well as the contractual relation of the parties, though we will probably find as we proceed that the exact nature of the latter is of little consequence. Appellant and his associates went with the note to McKinnon, the foreman in immediate charge of the work. McKinnon showed them the hole, which was then driven in about eighteen feet, and they went to work and drove it in about four feet farther during the next few days, the material therefrom being carried out across the ledge, where it was dumped over the outer edge by a wheelbarrow.

On Tuesday evening, September 14th, about six or seven o'clock, charges of dynamite which had been prepared in two tunnels, the first and second ones west of the one appellant and his associates were working at, were exploded. This blast was not one merely for the purpose of extending those tunnels, but was a heavy blast put in upon their completion, and was for the purpose of loosening the face of the bluff for the steam shovel. The effect of this blast was to break the rock wall above the ledge for some distance over towards the tunnel appellant and his associates were working at. This shattered zone widened as it went higher up the bluff, where it extended out to within a few feet of, if not over, the tunnel appellant was working at. This blast also jarred down a quantity of rock immediately in front of the opening to appellant's tunnel, blocking its entrance. The foreman, upon having his attention called to this material in front of the tunnel and its preventing work in the tunnel, told them to clear it away and that they would get paid by the day for that work. They thereupon proceeded with that work during

Wednesday, September 15, until about two o'clock in the afternoon, when some rock fell from the cliff above them. Being alarmed by this, they ceased work, and appellant went to McKinnon and told him of the falling rock and requested him to have the bluff made safe. McKinnon said he would make it safe, and returned with appellant to the tunnel. After looking at the face of the wall, he sent three men with ropes and tools to bar down the loose rock from the face of the bluff, superintending the work himself. He testified, in substance, that this was done with care, so as to leave no loose rock there liable to fall, so far as could be then determined. We have no testimony as to the care then exercised in this particular, save that of McKinnon himself. Appellant and his associates had entered the tunnel just before this barring down of the loose rock commenced, and continued their work there, but could not take any material out of the tunnel, and could not safely go out until about five o'clock in the evening, when the barring down had ceased. They then went out and quit work for the day.

The next morning, September 16, appellant and his associates returned and looked at the face of the wall so far as they could see it from the ledge. Whether or not they went to work before McKinnon came is not very clear, but in any event he very soon came there and told them that the place was now safe, and for them to go ahead and clear it out, referring to the loose rock in front of the tunnel. They then proceeded with their work, two of them removing the debris from in front of the tunnel, and one working at drilling in the tunnel. Nothing further occurred indicating danger until about eleven o'clock in the forenoon, when a quantity of rock fell from the wall or slope above, one of the pieces striking appellant and inflicting the injuries for which he seeks damages by this action. There was no appreciable shock or physical disturbance of any kind occurring at the time in the neighborhood. The rock evidently fell only because of its loose condition. The proper manner of barring

down the loose rock and of testing their looseness was testified to in considerable detail, and the evidence tended to show that loose rock on such a wall and slope could be discovered with great certainty. Appellant, a man of many years experience in rock work of this nature, after describing the manner of testing the wall, testified:

"Q. Now was the rock on this wall of such character that it could be barred down, as you have described here? A. Yes, sir; it could be barred down, so it would be as safe as this room right here is."

Appellant and his associates did not inspect the wall on the morning of the injury other than by looking at it from the ledge, where they could not see all of it. They evidently depended upon the assurance of McKinnon as to its safety. The mere fact that McKinnon had apparently completed the barring down was some assurance to that effect, and this was strengthened in their minds by his conversation with them that morning.

Let us first inquire what was the duty of respondent towards appellant and his associates as to the rendering the wall and slope safe from falling stone. We have noticed that appellant's foreman, McKinnon, was advised of the danger from falling stone on the day preceding the injury; that he then told appellant that he would send men up and make it safe; that he did send men up who, under his supervision, went over at least a portion of the wall barring down loose rock; that this work was apparently completed that afternoon; and that when appellant and his associates went there to work the following morning they were then told by the foreman, in substance, that the wall and slope were safe, and to go ahead and clear away the debris from in front of their tunnel.

In the light of these facts it seems clear to us that respondent then owed to appellant and his associates the duty of making the wall safe, in so far as it could be rendered safe by inspection and barring down of loose rock, and that appel-

lant then had the right to rely upon the assurance of respondent's foreman that he had caused the wall and slope to be made safe. Appellant and his associates had no occasion at that time to inspect the face of the bluff, even should it be considered that they might have been bound to inspect it in the absence of these facts. This being respondent's duty, and appellant having the right to rely upon the assurance of the foreman that such duty had been performed in such manner as to render the place safe, we think it follows that the falling of the rock so soon thereafter was such evidence of respondent's negligence in failing to make the place safe as required the submission of that question to the jury, unless the case is to be taken from the jury and decided as a matter of law against appellant because of the conclusiveness of respondent's evidence, which we will now notice.

For the purpose of determining whether or not respondent's evidence, as a matter of law, conclusively disproved its negligence, inferable from the facts we have noticed, we must regard the burden of such proof as resting upon respondent. We have seen that the only evidence tending to show due care in the inspection of the wall and the barring down of the loose rock was the testimony of the foreman McKinnon. He testified as to the manner in which the men under him tested and barred down the loose rock, tending to show that it was carefully done. Also that the men, as well as himself, were experienced in that kind of work, and that he looked over the work after its completion and found the place safe. He was, of course, by reason of his relation to respondent and his connection with the work, an interested witness. This brings us to the question, Was the learned trial court warranted upon this evidence alone in deciding, as a matter of law, that respondent had exercised such care in making the place safe as to relieve it from liability for the injury to appellant? When the burden of proving some disputed fact in a jury case rests upon a party, and such fact is sought to be proven

by no other evidence than the testimony of a single interested witness, a trial court is not warranted in determining, as a matter of law, that such fact has been proven. This rule, we apprehend, is subject to few, if any, exceptions. Its force as applicable to the facts of this case is well illustrated in the case of *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418, 31 N. E. 870, 30 Am. St. 678. In that case the plaintiff was driving under the company's elevated railway when an iron plate with part of a broken bolt fell and struck him, causing injuries for which he sued the company. But little question was made as to the fact that the falling of the plate established a *prima facie* showing of negligence against the company. The cause was taken from the jury upon the testimony of an interested witness tending to show a careful inspection and failure to discover the loose plate. Discussing this ruling of the lower court, Justice Haight, speaking for the court of appeals, said:

"The learned General Term, in its opinion, admits this proposition, and concedes that the fall of the plate or clip, in the absence of an explanation, raises a presumption of negligence. That court, however, reached the conclusion that the presumption was overthrown by the evidence produced on behalf of the defendant. As we have seen, that evidence was given by the witness Roach. It was his duty, as he testified, to examine carefully all rails, switches, signals, bolts and fastenings of all kinds, and to keep them tight. He further states that in June, 1885, he was engaged in following out his instructions and performed them to the best of his ability. In no place does he testify that he ever examined the bolt and clip which fell upon the plaintiff. He does not tell us how often he passed over the track, or to what extent he examined the bolts and fastenings. He only gives us his own conclusion that he performed his duty to the best of his ability. It does not appear to us that this was sufficient to remove the presumption which necessarily follows from the established fact that the bolt was broken, and in that particular the structure was out of repair and dangerous.

"But even if this evidence was sufficient to remove the presumption as held by the General Term, the credibility of the

witness would still be involved and be a question for the jury. This witness was the defendant's track walker. It was his duty to examine the bolt which was broken. If there was any negligence for which the defendant was chargeable, it was that of this witness. He was, therefore, a person interested, and possibly actuated by a motive to shield himself from blame."

It is true that decision had reference to an artificial structure maintained by the company; but in view of the evidence in this case tending to show the relation of appellant to respondent, the promise of its foreman to make the place safe, his assurance thereafter that it had been made safe, and respondent's ability to make it safe, we are not able to see that respondent's duty to appellant and his associates was in principle any different than it would have been had the wall been an artificial structure maintained by respondent. We are of the opinion that the testimony of McKinnon was not conclusive evidence enabling the court to decide, as a matter of law, that respondent was not negligent in failing to make the place safe. The following authorities are in harmony with this view. *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801; *Fireman's Fund Ins. Co. v. Oregon R. & Nav. Co.*, 58 Wash. 332, 108 Pac. 770; *Kennedy v. McAllister*, 52 N. Y. Supp. 714; *Kavanagh v. Wilson*, 70 N. Y. 177; *Babcock v. Chicago & N. W. R. Co.*, 62 Iowa 593, 18 N. W. 740, 17 N. W. 909; *Atchison & N. R. Co. v. Bailey*, 11 Neb. 332, 9 N. W. 50; *Cunningham v. Union Pac. R. Co.*, 4 Utah 206, 7 Pac. 795; *Felton v. Bullard*, 94 Fed. 781.

A considerable portion of the argument of learned counsel for respondent is devoted to their contention that appellant was performing his work as an independent contractor at the time he was injured, and for that reason respondent owed him no duty to make the place safe. We deem it unnecessary to determine whether the technical legal relation between them was that of owner and independent contractor or master and servant. There may be room for argument that either of

these relations then existed between them. We are of the opinion that, whichever of these relations existed, the negligence of respondent, which this evidence tends to show resulted in appellant's injuries, rendered respondent liable. It seems to us that since appellant was there at the instance of respondent, in pursuance of a business relation between them, and the assurance of the safety of the place made by respondent's foreman at so short a time prior to the injury, it is of no consequence whether appellant was there as an independent contractor or as a servant of respondent. *Curtis v. Barber Asphalt Paving Co.*, 44 Wash. 334, 87 Pac. 345.

It is contended that appellant's complaint does not state a cause of action. This contention of course would in no event call for an affirmance of the court's decision upon the challenge to the evidence, though it might call for a reversal of the overruling of the demurrer and permit an amendment of the complaint. It is insisted that, "Two matters are noticeably missing from this complaint; first, all allegation that the respondent knew, or in the exercise of reasonable care, could have known, of the danger; and, second, that the appellant was ignorant of the danger." Under the liberal rules of pleading adopted in this state we think these facts are to be inferred from the facts alleged in the complaint, though they are not specifically stated therein. We are of the opinion that the facts pleaded constitute a cause of action.

Some effort is made to liken this case to that of *White v. Spokane & Inland Empire R. Co.*, 54 Wash. 670, 103 Pac. 1119. We think, however, the cases are distinguishable. In that case the company was, as a matter of law, relieved from the duty of inspection because the undisputed facts showed that there was no apparent danger calling for inspection, and had not been for a month or more previous. In this case the danger was admittedly present only a few hours before the injury and was known to respondent. The question here was not as to the necessity of inspection and removal of the dan-

ger, but as to whether or not the duty to remove the danger rested upon respondent, and as to whether or not it negligently performed that duty. These, we think, were questions for the jury.

The judgment is reversed, with instructions to grant appellant a new trial.

RUDKIN, MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9270. Department Two. January 20, 1911.]

JAMES LASITYR, *Respondent*, v. THE CITY OF OLYMPIA, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS. In an action for personal injuries tried to the court, error in denying a motion for judgment on the pleadings is error without prejudice, where there was a full trial on the merits and no competent evidence rejected or incompetent evidence received by reason of the state of the pleadings.

JURY—QUALIFICATIONS—TAXPAYER. Under Rem. & Bal. Code, § 94, requiring a juror to be a taxpayer of the state of Washington, it is not sufficient to disqualify a juror to show that he was not a taxpayer of the county.

MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS—NOTICE—CONTRIBUTORY NEGLIGENCE. The contributory negligence of a pedestrian in failing to discover a wire netting about three feet high stretched across a sidewalk, is for the jury, where he fell over the same at night and there was evidence that it could not be seen.

SAME—OBSTRUCTIONS—NEGLIGENCE OF ABUTTING OWNER—LIABILITY OF CITY—NOTICE. A city permitting an abutting owner to obstruct a street in the laying of walks is liable for defects created or negligence as if the city itself had been doing the work, and notice to the city of the defects is not necessary.

EVIDENCE — COMPETENCY — EXPERIMENTS. Upon an issue as to whether a place was well lighted, where evidence of experiments with a similar light was offered, the determination of the preliminary questions as to whether the conditions were substantially similar is largely discretionary; and the quantity of light given out by an arc light is not so unvarying at all times as to make it an abuse of discretion to exclude evidence thereof.

[1]Reported in 112 Pac. 752.

APPEAL—REVIEW—HARMLESS ERROR—TRIAL—MISCONDUCT OF COUNSEL. It may not be prejudicial error, on exception to misstatements of the counsel in argument, to refuse to interfere with the course of the argument and further charge the jury, where the court, on objections made, referred to the written instructions given, wherein the duty of the party was clearly defined.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered April 2, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian in falling over an obstruction on a sidewalk. Affirmed.

George R. Bigelow (G. C. Israel, of counsel), for appellant.

RUDKIN, J.—This was an action to recover damages for personal injuries. On the 8th day of October, 1908, contractors were engaged in laying a cement sidewalk on the south side of West Fourth street in the city of Olympia, between Main street and Columbia street. The walk in question was laid by permission of the city, but under a private contract with the abutting property owner. The walk was completed, or at least unobstructed, from Main street to a point about thirty feet east of Columbia street. At the latter point, three planks, one foot in width and two inches in thickness, were laid from the entrance to a store building, a foot or eighteen inches above the walk, to the curbing at the outer edge of the walk, for the purpose of giving access to and from the building without walking over the green cement. Immediately west of these planks, fine wire netting, about three feet in height, extended from the store building along the edge of the planks to the outer edge of the walk, and thence along the curbing to and around the corner at Columbia street, to protect the newly constructed walk until it should season or harden. There were no barriers across the walk other than those mentioned, and no lights or other warnings to admonish or protect foot passengers, except the street lights in the vicinity. There was an arc light at the intersection of Columbia and West Fourth streets, about seventy feet distant

from the place of the accident, another arc light at the intersection of Main and Fourth streets, about 270 feet distant from the place of the accident, and certain other lights on the opposite side of the street in front of business houses. About 8 o'clock on the evening of the above date, the plaintiff left his home to visit a lodge room on Columbia street west of the obstruction in question. In so doing he passed westerly along the sidewalk on the south side of Fourth street and tripped or fell over the wire netting stretched across the sidewalk in front of the store building above described, causing the injury for which a recovery was here sought. From a judgment in favor of the plaintiff, the city has appealed.

In addition to denials and a plea of contributory negligence, the answer, as a second affirmative defense, alleged that, prior to the accident complained of, the appellant had closed West Fourth street between Main street and Columbia street to public travel, and had caused notice thereof to be posted in public places in the vicinity of the closed portions of the street, and that the respondent disregarded said notices and was a trespasser in the street at the time he met with the accident complained of. This latter defense was not denied by reply, and by reason of that fact the appellant, at the commencement of the trial, moved for judgment on the pleadings. The first error assigned is based on a denial of this motion. The case was twice tried in the court below, and at each trial the court ruled that this defense amounted to nothing more than a denial of the allegation in the complaint to the effect that the respondent had no notice of the dangerous and unsafe condition of the sidewalk. Waiving the question whether this ruling was technically correct when made, the case has been fully tried out on the merits, no competent testimony was rejected and no incompetent testimony received because of the state of the pleadings, and if error was committed in that regard it was error without prejudice to the substantial rights of the parties, and must be disregarded here.

The next assignment is based on the denial of a challenge for cause, interposed to one of the jurors on the ground that he was not a taxpayer of the state. Section 94 of Rem. & Bal. Code, provides that:

"No person shall be competent to serve as a juror in the superior courts of the state unless he be,

"(1) An elector and taxpayer of the state of Washington. . . . ."

We are inclined to agree with the respondent that a taxpayer, within the meaning of this statute, is a person owning property in the state, subject to taxation and on which he regularly pays taxes. *State ex rel. Sutton v. Fasse* (Mo. App.), 71 S. W. 745. But conceding such to be the rule, the appellant merely showed that the juror in question was not a taxpayer of Thurston county, and this was not sufficient to disqualify. *State v. Jahns, ante* p. 636, 112 Pac. 747.

The next error assigned is based on the denial of a motion for a nonsuit interposed at the close of the respondent's testimony, on the ground that the second affirmative defense was not denied by reply, and on the further ground that the respondent was guilty of contributory negligence. We have already disposed of the first ground of the motion under the first assignment of error, and the second ground is equally without merit. The obstruction in the street which caused the injury in this case was the wire netting, and unless it could be seen, there was nothing whatever to give notice or warning of its presence. The plank walk leading into the storeroom was no barrier, because a foot passenger could readily step over it, as the respondent did in this case, at the outer edge of the walk where the planks were but a few inches high. If the wire netting could not be seen—and there was ample testimony tending to show that it could not—it was a trap for the unwary, and its maintenance was culpable negligence on the part of the city. Whether the respondent had notice of its presence or should have discovered it upon his approach -ly questions of fact for the jury, under the circum-

stances disclosed by this record. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357.

The next error assigned is based on the claim that the city had neither actual nor constructive notice of the obstruction in the street, and on the refusal of certain requests for instructions bearing upon that question. The court instructed the jury, in effect, that if the city permitted an abutting property owner to obstruct the street it was not relieved from the obligation to see that the street was kept in a reasonably safe condition for public travel, "but that its duty was the same as if such obstruction, if any there be, were being done under the immediate direction and control of the city or its officers."

"There are some authorities which hold a municipality responsible for the negligence of one who, acting under its license or permission lawfully granted, creates any defect or obstruction which endangers the safety of persons using the streets. These cases proceed upon the theory that, being charged with the care of its streets, it is the duty of the city to supervise the work permitted to be done and to use suitable precautions to prevent accidents; and notice of the defect or obstruction in the street is not necessary, in such case, to fix the city's liability." 28 Cyc. 1355.

Such is the rule adopted in this state. In *Sutton v. Snohomish, supra*, the court said:

"The fact that a permit was granted was notice to the authorities that the work was in progress, and they were then charged with the duty of seeing it was properly conducted."

The appellant offered testimony tending to show that the lamp at the intersection of Fourth street and Columbia street on the night preceding the trial of this action was identical with the lamp at the same point on the night of the accident; that the voltage passing through the arc light system on the night of the accident was greater than the voltage on the night preceding the trial; and that on the night preceding

the trial witnesses could readily read newspapers on the sidewalk at the place of the accident by the light of the lamp in question. The appellant further offered to prove by an electrical expert the quantity of light in candle power cast on the sidewalk at the place of the accident on a dark and cloudy night. These several offers were rejected, and the ruling of the court is assigned as error. Experiments made out of the presence of the court are competent evidence in a proper case, but before they can be admitted it must appear that they were made under substantially the same conditions as existed at the time of the transaction in question, and the trial court is necessarily vested with a large discretion in determining the preliminary questions of fact upon which their admissibility depends. Jones, Evidence (2d ed.), § 410; *Chicago City R. Co. v. Brecher*, 112 Ill. App. 106; *Chicago & Eastern Ill. R. Co. v. Crose*, 113 Ill. App. 547; *City of Ord v. Nash*, 50 Neb. 335, 69 N. W. 964; *De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & Iron Co.*, 2 Ga. App. 493, 58 S. E. 790; *Augusta R. & Elec. Co. v. Arthur*, 3 Ga. App. 513, 60 S. E. 213; *Huggard v. Glucose Sugar Refining Co.*, 132 Iowa 724, 109 N. W. 475.

In *City of Ord v. Nash, supra*, the court said:

"Finally, it is argued that the trial court erred in rejecting as evidence the result of certain experiments made a year or more subsequent to the accident. The witnesses named were, according to the offer in the record, on a cloudy night, with the assistance of a light in an adjoining house, similarly situated to one burning at the time of the accident, able to plainly see the footpath and also the surface of the ground, for a radius of several feet from the point where the injury was received. There is, as all agree, some room for the exercise of discretion by the trial court in the receiving and rejecting of evidence of this character, and we are unable to say that there has, in this instance, been an abuse of such discretion. We must not be understood as intimating that it would have been reversible error to receive the evidence offered; but the rejecting of evidence tending to prove that the condition of the premises was, at a subsequent time, dis-

cernible by witnesses whose attention was specially directed to the subject, and under circumstances in some respect at least materially different from those surrounding the plaintiff below at the time of the accident, affords no ground of complaint by the city."

While we are not prepared to say that it would have been error to admit proof of these experiments, we do not think that the quantity of light given out by an arc light, at all times and under all conditions, is so certain and unvarying as to render the ruling of the court erroneous, or manifest an abuse of sound judicial discretion.

Error is assigned in the refusal of the court to give certain instructions on the question of contributory negligence, and also an instruction defining the duty of the city in regard to placing and maintaining signal lights and beacons, but we think these questions were fully covered in the general charge of the court.

It appears from an objection interposed by the appellant, during the opening argument of counsel for respondent to the jury, that counsel for respondent was contending that the court had charged the jury that it was incumbent on the appellant in all cases to place signal or beacon lights on barriers or obstructions in the street, and the appellant requested the court to correct counsel and instruct the jury to the contrary. The court replied that it had already charged the jury in writing and that the jury would have the instructions before them in their room, but refused to further interfere with the course of the argument. There is nothing in the record to indicate the nature of the argument made by counsel for respondent to which exception was taken, aside from the language of the objection itself, but assuming that it was such as counsel alleged, we do not think that the failure of the court to correct counsel or further instruct the jury was prejudicial error. For, in at least two different places in its charge, the court defined the duty of the appellant in that regard, and its language was not susceptible or open

to the construction placed upon it by counsel. Thus the court said: "It is the duty of the city in order to guard and protect the public, by day or by night, to properly guard any obstruction that may be placed upon any sidewalk, being constructed or improved by proper and sufficient signals or other general or special lights *or barriers and warnings to protect travelers from injury.* The law being that the traveler upon a sidewalk has the right to assume that it is safe for him to pass along such sidewalk or highway in the absence of reasonable *barriers*, lights or *warnings* to the contrary." And again, "Unless, as already stated he is cautioned by some *sign* or *notice* that would attract the attention of the ordinary person exercising the usual degree of care, caution and prudence." While we do not think that prejudicial error was committed in the matter complained of, the practice of permitting counsel to misstate or misconstrue the instructions of the court in argument before the jury is not to be approved or commended.

This disposes of all the assignments of error which merit discussion, and finding no reversible error in the record, the judgment is affirmed. The respondent has failed to aid the court in the consideration of this case by brief or otherwise, and the affirmance will therefore be without cost to the city.

DUNBAR, C. J., CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 7956. Department Two. January 21, 1911.]

JAMES DALGARDNO, *Respondent*, v. JOHN TRUMBULL *et al.*, *Appellants*.[1]

APPEAL — DECISION — LAW OF CASE — REMAND — QUESTIONS CONCLUDED. Where, upon appeal, the rights of the parties are determined except as to the amount of taxes paid, and the cause is remanded for the purpose of ascertaining the amount, the decision becomes the law of the case, and on the remand no other question can be presented.

TAXATION—LIEN FOR TAXES PAID. When taxes are paid in good faith to protect the property from seizure, and inure to the benefit of the owner, a lien for repayment of the taxes is imposed on the premises.

Appeal from a judgment of the superior court for Jefferson county, Still, J., entered December 2, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover possession of real property and to quiet title. Affirmed.

Trumbull & Trumbull, for appellants.

U. D. Gnagey, for respondent.

MORRIS, J.—In June, 1904, respondent brought an action against appellants, alleging the ownership of the south half of lot 2, block 109, of the original townsite of Port Townsend, and praying judgment, for the recovery of possession; for the rental value while out of possession; to quiet his title as against any claim, interest, or right of defendants; to enjoin defendants from asserting any claim to the premises; and to declare a lien for the taxes paid thereon. A demurrer was interposed to the complaint, which being sustained, respondent refused to plead further, and judgment of dismissal was entered against him, from which judgment he appealed to this court. On September 18, 1905, this court filed an opinion in which the ruling of the court below in sustaining the

[1]Reported in 112 Pac. 928.

demurrer was affirmed. The court held, however, that plaintiff was entitled to a lien upon the premises for the amount of taxes paid thereon, and remanded the cause to the court below, with instructions to ascertain the amount of taxes paid and to declare the same a lien *(Dalgardno v. Barthrop*, 40 Wash. 191, 82 Pac. 285), an examination of which will convey a better understanding of the then opinion of this court and its reasons for the holding made and the judgment here entered. The judgment of this court being filed in the court below, respondent moved for judgment for the amount of taxes paid as shown by his complaint, and that the same be declared a lien, which was denied, and the appellants ordered to file an answer. This order was complied with by appellants Trumbull filing an answer raising an issue upon all the allegations of the complaint, to which answer respondent made reply. The cause coming on for trial, the court found, among other matters, the amount of taxes paid by respondent to be the sum of $301.80, and entered a decree adjudging such sum, with interest and costs, a lien upon the easterly forty one-hundredths of the south half of said lot 2; from which this appeal is taken.

In the trial below, many unnecessary issues were made and passed upon by the court in its findings, to a number of which appellants take exception. Upon the judgment of this court there was but one issue to be tried—the amount of taxes paid by respondent, which amount being found, it was the duty of the court below, as directed by this court, to decree a lien upon the premises. Appellants in their brief raise many questions concerning matters prior and subsequent to the first appeal, which they urge should be taken into consideration by us in determining the rights of the parties. We have no concern with any controversy between the parties, save only the one properly before us, and that is, the finding and decree made by the court below determining the amount of taxes paid and establishing the same as a lien. That was the plain mandate of this court in its judgment upon the first appeal, and was

the only matter proper to be inquired into, the first judgment of this court having become the law of the case and determined respondent's right to a decree in the amount of taxes paid. The only legal question that could in any event arise in connection with the mandate of this court upon the first appeal, which could be urged against such a decree, would be that it appears that respondent was not acting in good faith in paying these taxes, nor under a belief that he was the owner of the property and entitled to the possession thereof, and we do not so find; it being the established rule in this state and elsewhere that, when taxes are so paid in good faith, which protect the property from seizure and thus inure to the benefit of the real owner, a lien is imposed upon the premises. *Rothchild Bros. v. Rollinger*, 32 Wash. 307, 73 Pac. 367; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099; *Spokane v. Security Savings Society*, 46 Wash. 150, 89 Pac. 466; *Childs v. Smith*, 58 Wash. 148, 107 Pac. 1053.

Finding no error committed by the court below in obeying and following the mandate of this court as contained in the judgment and remittitur upon the first appeal, the judgment is affirmed.

DUNBAR, C. J., and CROW, J., concur.

RUDKIN, J. (concurring)—I concur solely on the ground that the question sought to be raised on this appeal is foreclosed by the opinion of the court on the former appeal.

[No. 9032. Department Two. January 21, 1911.]

J. M. Watkins *et al.*, *Respondents*, v. Anna Davison, *Appellant*.[1]

Vendor and Purchaser—Contract—Mutuality. A receipt, containing the terms of a contract to purchase land, made to one as agent, the principal being undisclosed, and accepted in writing by the owner, is not a mere option or objectionable for lack of mutuality, where the principal made the preliminary payment of $50, tendered timely payment and performance, and was at all times ready to perform, promptly commencing action for specific performance.

Specific Performance — Defenses — Fraud — Pleadings. In an action for specific performance, fraud is an affirmative defense to be specially pleaded.

Vendor and Purchaser — Rescission by Vendor — Fraud — Evidence—Sufficiency. No fraud is shown, warranting a vendor in refusing to complete a sale, where it appears that she had listed the property with her selling agent, that a contract to purchase was made with the agent, signing as such, for an undisclosed principal, and accepted in writing by the vendor, with a preliminary payment of $50, that the vendor at the agent's request cured defects in the title, and never offered to return the money received, that no fraud, or improper or inconsistent action by the agent was shown, and the vendee tendered timely payment and performance; especially where the vendor, in an action for specific performance, did not plead fraud as a defense (Chadwick, J., dissenting).

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 19, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

Frederick W. Dewart (*Guy Brockway*, of counsel), for appellant.

Danson & Williams, for respondents.

Crow, J.—Action by J. M. Watkins, Maud Watkins, his wife, and John Bigham, against Anna Davison, to enforce specific performance of a contract to sell real estate. From a decree in their favor, the defendant has appealed.

[1]Reported in 112 Pac. 743.

Respondents alleged that, on August 12, 1909, the appellant, being the owner of certain real estate in the city of Spokane, entered into a written agreement to convey the same to M. C. Hunter Company, a corporation, agent, as follows:

"Spokane, Wash., August 12, 1909.

"Received of M. C. Hunter Co., Agent, $50 as deposit on account of the purchase of lot 15, block 70, of Central addition to Spokane, Washington. Purchase price is $2,100. Full initial payment to be $1,000, of which the above $50 is a part; balance of initial payment to be made at our office when settlement shall be made, on or before September 1, 1909; deferred payments of $1,100 to be paid as follows: On or before eighteen months from Sept. 1, 1909, with interest from Sept. 1, 1909, at 8 per cent per annum payable semi-annually. Purchaser to assume prior encumbrances as follows: None. . . .

"Purchaser shall have abstract certified down to date for examination. After deal is closed, abstract to remain with selling party until property is paid for, when purchaser shall have a clear merchantable title to said property, clear of all encumbrances, except as aforesaid, and in case he shall find any defects in title as it now is, the seller shall have a reasonable time in which to perfect the same, but if it cannot be so corrected, the deposit shall be returned and deal declared off.

"It is agreed that in case the purchaser fails or refuses to take said property as above outlined, we shall, at our option, retain the above deposit in lieu of services rendered. Money paid by the purchaser may be used in paying off existing encumbrance. This sale is subject to owner's approval.

"In closing this deal usual legal blanks used by us shall be used.

"Purchaser shall have contract for warranty deed.

"Purchaser agrees to take said property, and pay for the same as above outlined.

"M. C. Hunter Co., Agents, Incorporated
"Per M. C. Hunter.

"I accept above sale and agree to pay you a commission of ———— per cent $100.

"Anna Davison, Owner;"

that the agreement was made on behalf of respondents as

purchasers: that an abstract was furnished, which disclosed a defect of title for want of the record of certain probate proceedings; that appellant directed M. C. Hunter Company to procure and record a certified copy of the proceedings, which was done; that the initial payment was made and tendered by respondents in accordance with the agreement; that they executed on their part the contract for a warranty deed as therein provided, but that appellant refused to execute the same, or complete the sale. Appellant answered with denials only. The trial court made findings in accordance with the allegations of the complaint.

There is some contention in the briefs, regarded by us as immaterial, relative to the proper location and purpose of the words "purchaser agrees to take such property and pay for the same as above outlined," which appears in the receipt. These words are followed in the original by blank lines, manifestly intended for signatures of the purchasers. M. C. Hunter Company did not at first disclose the names of respondents to appellant, and the lines remained blank. The receipt upon its face, however, shows that the offer to buy was made through M. C. Hunter Company on behalf of an undisclosed purchaser, and that the offer was accepted in writing by appellant, which made it her complete and valid agreement to sell. She now contends that the receipt was an option only, that no mutuality of contract existed, and that her unilateral acceptance did not bind the purchasers. Respondents made the payment of $50, thereafter tendered timely payment and performance, have at all times been ready, willing, and able to close the deal, and commenced this equitable action on September 15, 1909, to compel specific performance. These acts on their part supplied any lack of mutuality. *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 85 Pac. 338, 114 Am. St. 137; *Conner v. Clapp*, 42 Wash. 642, 85 Pac. 342.

It will be observed that the receipt for the $50 earnest money was executed by M. C. Hunter Company, as agent,

and that appellant as owner appended thereto her written acceptance of the sale. The evidence discloses that she had listed the property with M. C. Hunter Company, as her agent, for sale at $2,100; that shortly thereafter the respondents offered $2,050, advancing $50 in cash with the offer; that M. C. Hunter Company drew the receipt above set forth, reciting a sale for $2,050, and communicated the offer to appellant who refused to accept the same, but did agree to sell for $2,100; that this modification was accepted by respondents, and that the purchase price was changed in the receipt to correspond therewith; that M. C. Hunter Company thereupon delivered its $50 check to appellant, who, without demanding the names of the purchasers, signed the acceptance and delivered her abstract of title for examination; that at her request the title was promptly perfected; that M. C. Hunter Company made certain disbursements for extending the abstract, recording probate papers, and paying taxes and special assessments; that respondents delivered their check to M. C. Hunter Company for $950, in settlement of the remainder of the initial payment of purchase money; that they as vendees executed a contract of sale calling for a warranty deed, in accordance with the agreement; that M. C. Hunter Company, at their request and for the purpose of closing the deal, tendered the money and contract to appellant, who refused to execute the contract or complete the sale; that M. C. Hunter Company did not represent respondents, the purchasers, in any manner other than appeared on the face of the receipt, their identity being then undisclosed to appellant; and that M. C. Hunter Company did not receive, nor was it at any time to receive directly or indirectly, remuneration or profit from the respondents or from any person other than the appellant, who had agreed to pay it a commission on the sale.

We do not understand that appellant now denies her written acceptance of the contract, or that she denies that she had an opportunity to read and learn its contents; that it was

made to her by M. C. Hunter Company; that the $50 check was left with her; that she delivered an abstract of title to M. C. Hunter Company, or that the initial payment was tendered her in accordance with the terms of the receipt, from which tendered payment M. C. Hunter Company deducted its commission, and the disbursements it had made at her request. Appellant's contention seems to be that she has in some manner been defrauded by M. C. Hunter Company, her selling agent; that in the language of her counsel, it has attempted to serve two masters. She testified that she told the agent she would sell for $2,100 to $2,200; and contends that it originally offered the lots to respondents for $2,050; that M. C. Hunter Company did not disclose the names of the purchasers, but as her agent, executed the receipt to M. C. Hunter Company, as agent for the purchasers; that she did not at the time know a check for $50 earnest money had been left with her, when she accepted the sale, she thinking the check was a receipt for her abstract of title.

She now resorts to the defense of fraud, although no such defense was pleaded in her answer. Respondents objected to evidence which she offered for the purpose of showing fraud, which defense when pleaded could only be available to avoid a contract already executed. By her answer she had denied its execution. Fraud being an affirmative defense should be pleaded. This being an equitable action, the trial judge was very liberal in admitting evidence offered by appellant upon which she relied to show fraud, and were it to be conceded that she was entitled to that defense without pleading it, we nevertheless conclude that she has failed to sustain it. She herself testified that a duplicate copy of the written receipt was delivered to, and left with her, by M. C. Hunter Company, and that about September 1, 1909, after some delay had occurred in perfecting the title, she informed M. C. Hunter Company that she did not care to close the deal. If there had been any fraud or deceit on the part of M. C. Hunter Company, she must have been aware of it on the date last men-

tioned. The original check for $50 which was given her by M. C. Hunter Company on August 12, 1909, when she first ratified the sale, is attached to the statement of facts as an exhibit, and shows that she endorsed and cashed it on September 7, 1909, several days after the date on which she says she attempted to repudiate the agreement. There is no evidence that she offered to return the check or its proceeds to M. C. Hunter Company. The evidence unquestionably shows that the sale had been made to respondents by M. C. Hunter Company, as appellant's agent, on August 12, 1909. It also appears that respondents insisted on closing the deal, and that M. C. Hunter Company, at appellant's instance, perfected the title, and made disbursements for expenses, taxes, and assessments. We see no impropriety on the part of M. C. Hunter Company in making tender to appellant and requesting her to execute the contract for a warranty deed in accordance with the terms of the receipt, after the purchase money and the proposed contract had been tendered and delivered to it as appellant's agent for that purpose. In view of the attitude of appellant and her continued opportunities for informing herself as to the terms of the sale, we find no improper, unconscionable or inconsistent conduct on the part of her selling agent sufficient to deprive the respondents of their right to a specific performance.

The judgment is affirmed.

DUNBAR, C. J., RUDKIN, and MORRIS, JJ., concur.

CHADWICK, J. (dissenting)—In my opinion the Hunter Company was dealing on its own account and not for another, and that appellant should not be bound to her contract over her protest and attempt to rescind.

[No. 9232. Department Two. January 23, 1911.]

JOE MROZEVICH, *Respondent*, v. WESTERN STEEL CORPORATION, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—COAL MINE—VENTILATION—WARNING—EVIDENCE—SUFFICIENCY. The evidence sufficiently established that an explosion of gas in a coal mine was caused by a defective ventilating system and defective wiring, where it appears that the mine was never free from marsh gas, which is highly explosive when mixed with air in certain proportions, that before the accident the gas was coming in at a point that was very damp, that the insulation of the electric wiring was defective, whereby an arc was easily formed, a spark igniting the gas, that the explosion occurred at this point when no one was near, and from no other conceivable cause.

NEGLIGENCE—PLEADING AND PROOF—TRIAL. Evidence of negligence not alleged in the complaint, received without objection, will be considered on motion for a nonsuit.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Error in the admission of evidence of another explosion in the same mine is harmless, where on its appearing that the witness was not present, the evidence was stricken and the jury instructed to disregard it.

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—COAL MINE—CONDITIONS—EVIDENCE—ADMISSIBILITY. In an action for injuries sustained in a mine explosion, evidence of a witness as to the condition of the mine three weeks later is admissible, when the witness was the first person to enter the mine after the explosion.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for seven thousand dollars for injuries to a coal miner through an explosion is not excessive, where he was badly scarred and disfigured, his suffering was great, one of his hands permanently injured, his earning capacity was $100 per month, and will in the future be slight at manual labor, and he is ill fitted for anything else.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered July 7, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through an explosion in a coal mine. Affirmed.

[1]Reported in 112 Pac. 925.

Lyter & Folsom, for appellant.

Govnor Teats, *Hugo Metzler*, and *Leo Teats*, for respondent.

RUDKIN, J.—This was an action to recover damages for personal injuries. On the 6th day of December, 1908, the defendant was engaged in developing a coal mine at Ashford, in this state. The entrance to the mine was through a tunnel extending into the mountain side a distance of upwards of 4,000 feet. For the greater part of this distance the tunnel was constructed through rock, but for the last 400 feet it followed the vein of coal. The tunnel was ten feet wide and eight feet high, constructed on an incline of about one per cent. The mine or tunnel was ventilated by a system of fans and air boxes, and was lighted by electricity. For the first 3,000 feet, the air box was three feet ten inches by sixteen inches in dimensions; for the next seven hundred feet, two feet ten inches by sixteen inches in dimensions; and from that point to a point within eighty feet of the face of the tunnel, the larger sized box was again used. From this latter point smaller boxes extended to within eight or ten feet of the face of the tunnel, with a nozzel extending upwards to catch or admit the gas. A fan was connected with the air box at the entrance, and a second one about 700 feet from the entrance. The wire conducting the electrical current into the mine was attached to the timbers at the side of the tunnel. On the above date the plaintiff and three of his coemployees, at work near the face of the tunnel, were severely burned and injured by an explosion of gas, and the present action was instituted in the plaintiff's behalf to recover damages for the injuries by him received. From a judgment in favor of the plaintiff in the sum of $7,000, this appeal is prosecuted.

The principal assignment of error is based on the contention that there was no testimony tending to show actionable negligence on the part of the appellant, and that a nonsuit should have been directed at the close of the respondent's

testimony. It appears from the record, without apparent contradiction, that a form of gas, commonly known as marsh gas, was continually accumulating in the mine or tunnel, and that it came in in quantities at different places through seams or fissures in the rocks and veins. This gas is lighter than the air and will naturally rise to the top of the tunnel among the timbers. When mixed with air in certain proportions it is highly explosive, and the mine was never entirely free from it. The testimony further showed that, for some days before the accident, this gas entered the mine in considerable quantities at a point about 135 feet distant from the face of the tunnel, where the men were at work; that the tunnel at this point was very damp or wet; that the insulation on the wiring was there defective; that under such circumstances an arc could easily be formed; and that a spark from the wire would ignite the gas and cause an explosion. It further appeared that the explosion occurred at this point, that it could only result from the gas coming in contact with a flame or spark, and that there was no person at or near the place of the explosion at the time of its occurrence. It also appeared that the air boxes were leaky at different points, permitting the gas to escape therefrom, and that the box was not large enough to take up all the gas accumulating in the tunnel and driven to its face. Under this testimony, the jury was fully warranted in finding that the injury resulted from a defective ventilating system and the defective wiring. In fact we do not see how a different conclusion could have been reached.

It is said the complaint does not allege negligence in the lighting system, but the proof was received without objection, and must therefore be considered by this court on motion for nonsuit or directed judgment. An admission of counsel in one case cannot be accepted as proof in another, yet it is a significant fact that in the case of *Nelson v. Western Steel Corporation, post* p. 672, 112 Pac. 924, which arose out of the same accident, counsel for appellant in open court

admitted liability and questioned only the amount of the recovery. We think the record in this case fully justified the course pursued in the *Nelson* case.

We will now refer briefly to the remaining assignments of error. Error is assigned in the admission of testimony tending to show another explosion in the same mine some months before. After this testimony was admitted, it was made to appear that the witness was not present at the time of the former explosion, and his testimony was thereupon stricken from the record and the jury instructed to disregard it. The ruling was therefore harmless if erroneous. The ruling of the court admitting testimony tending to show the condition of the mine at the point where the explosion occurred, some three weeks after the accident, is also assigned as error. This testimony was given by the first person to enter the mine after the explosion, and it would seem immaterial whether it was three hours or three weeks after the accident, so long as the conditions in the mine remained unchanged. Errors are assigned in the charge of the court and in a refusal to charge as requested, but the charge as a whole was clear and specific and exceedingly fair to the appellant.

It is lastly contended that the verdict is excessive. The respondent was badly burned about the hands, arms, face, neck and back. His pain and suffering was necessarily great and long continued. He was badly scarred and disfigured, and will remain so through life. His hands were injured, one of them permanently so. His earning capacity at the time of the accident was upwards of $100 per month, and his earning capacity in the future will be slight at hard manual labor, and he is ill fitted for anything else. Under such circumstances, the verdict is neither unreasonable nor excessive, and the judgment is accordingly affirmed.

DUNBAR, C. J., CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 9234. Department Two. January 23, 1911.]

A. F. NELSON, *Respondent*, v. WESTERN STEEL CORPORATION, *Appellant*.[1]

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $8,000 for injuries to a coal miner caused by an explosion, reduced by the trial judge to $6,000, will not be held excessive on appeal, where in addition to great pain and suffering, loss of time, and temporary disability, the plaintiff was marred and disfigured for life.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered July 7, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through an explosion of gas in a coal mine. Affirmed.

Lyter & Folsom, for appellant.

Govnor Teats, *Hugo Metzler*, and *Leo Teats*, for respondent.

RUDKIN, J.—The injuries for which a recovery was here sought arose out of the same accident as those involved in the case of *Mrozevich v. Western Steel Corporation*, *ante* p. 668, 112 Pac. 925. In this case, however, liability on the part of the defendant company was admitted, the amount of damages was the only question submitted to the jury, and the claim that excessive damages were allowed, under the influence of passion and prejudice, is the only question presented to this court. The jury returned a verdict in favor of the plaintiff in the sum of $8,000, but the court below refused a new trial only upon condition that the plaintiff remit the sum of $2,000 from the verdict. The remission was made as directed, and from a judgment on the verdict as reduced, this appeal is prosecuted.

The pain and suffering endured by respondent in this case and the disfigurement of his person do not differ materially

[1]Reported in 112 Pac. 924.

from those present in the case cited, but here there was no evidence of permanent disability, unless the jury might infer such disability from the condition of the respondent at the time of the trial and from his appearance on the witness stand. It must be conceded that the recovery in this case was liberal, even as reduced by order of the trial court, but so much depends upon the physical appearance of the respondent, who appeared before the trial judge and jury, that we do not feel warranted in overriding their judgment in the matter of damages. Aside from the pain and suffering, loss of time and at least temporary disability, the respondent must go through life marred and disfigured, deprived in a large measure of the comfort and companionship of others, an object of pity and abhorrence to his fellowmen, and an object of ridicule to the thoughtless and unfeeling. *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206.

Under all the circumstances, therefore, we do not feel called upon to further reduce a verdict which has already been reduced by the trial court, nor do we feel that we would be justified in so doing. Finding no error in the record, the judgment is affirmed.

DUNBAR, C. J., CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 9205. Department One. January 26, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. AXEL ANDERSON, *Appellant*.[1]

INFANTS—MINORS IN POOL ROOMS—INTOXICATING LIQUORS—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 2445, making it a gross misdemeanor to allow minors in any drinking saloon, dance house, public pool or billiard hall, concert saloon . . . "where intoxicating liquors are sold," the quoted words qualify all the preceding terms, and it is not an offense to allow minors in pool rooms in which no intoxicating liquors are sold; and if capable of two constructions, the one in favor of innocence must be adopted.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered August 29, 1910, upon a trial and conviction of a gross misdemeanor. Reversed.

Bates, Peer & Peterson, for appellant.

J. L. McMurray and *F. G. Remann*, for respondent.

PER CURIAM.—Axel Anderson was convicted of a gross misdemeanor and appeals from the judgment and sentence pronounced against him.

The material part of the statute under which the defendant was convicted, as amended by the special session of 1909, reads as follows:

"Section 193. Every person who, (1) Shall admit to or allow to remain in any [drinking saloon] dance-house, public pool or billiard hall, concert saloon, or in any place except a restaurant or dining room, where intoxicating liquors are sold or given away. . . . . any person under the age of twenty-one years . . . . . shall be guilty of a gross misdemeanor." Laws 1909, Special Session, p. 66, chap. 27, § 1 (Rem. & Bal. Code, § 2445).

The information charged:

"That the said Axel Anderson in the county of Pierce, in the state of Washington, on or about the 5th day of March,

[1]Reported in 112 Pac. 931.

nineteen hundred and ten then and there being unlawfully did admit to and allow to remain in that certain public pool and billiard hall, known as the Washington Pool Hall, William Dwyer, Henry Crowl, and Alfred Harrington, all being then and there male persons under the age of twenty-one years, said public pool and billiard hall being then and there owned, kept and managed by him the said Axel Anderson, and located in that certain building known and designated as number 1020 South "K" street, in the city of Tacoma, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington."

To this information a demurrer was interposed on the ground that it did not state facts sufficient to constitute a crime, the precise objection being that it was not alleged therein that the public pool and billiard hall which it was charged that the defendant kept, owned and managed, and into which the minors were admitted and allowed to remain, was a place where intoxicating liquors were sold or given away. The demurrer was overruled, whereupon a trial was had in which it was shown in evidence that the appellant conducted a public pool and billiard hall to which the persons named in the information had been admitted and allowed to remain, and that such persons were under the age of twenty-one years. No evidence was introduced, however, tending to show that intoxicating liquors were sold or given away in such place, or that it was connected with any place where such liquors were sold or given away; on the contrary, it was conceded by the state that the facts were otherwise. The appellant challenged the sufficiency of the evidence to support a conviction, which challenge was likewise overruled, and the conviction of the appellant followed as before stated.

The court was in error we think in allowing the appellant to be convicted. We think the phrase found in the statute; namely, "where intoxicating liquors are sold or given away," was intended to qualify all of the preceding terms, making it an offense to allow minors to enter and remain in public

pool and billiard halls only in those instances where intoxicating liquors are sold or given away in such halls. The statute may be of doubtful meaning on the question here suggested, but if it be so, it is only another reason for giving it the more narrow construction. Laws are interpreted in favor of liberty, and if a statute is capable of two constructions, one of which makes a given act criminal and the other innocent, the statute will be given the construction which favors innocence.

The judgment is reversed, and the cause remanded with instructions to discharge the appellant.

[No. 8809. Department One. January 26, 1911.]

MONS GRONNING, *Respondent*, v. ELLIOTT BAY MILL & LUMBER COMPANY, *Appellant*.[1]

EVIDENCE—PAROL EVIDENCE—RECEIPT—CONTRACT. A mere receipt for money paid is not a contract or conclusive, and parol evidence of overpayment is admissible without showing fraud, coercion or mutual mistake.

SALES—CONTRACTS—EVIDENCE—ADMISSIBILITY. Upon an issue as to the price of logs fixed by the contract of sale, evidence of the market value at the time of sale, and the cost of towing, delivery, etc., is admissible as tending to show the reasonableness and probability of the several contentions of the parties; but evidence of the price paid on a specific sale a few days before is inadmissible.

SAME. Upon a contract to pay for logs certain prices for specified grades, entered into before the logs had been inspected, evidence of the quality or grade of the logs is inadmissible to show the improbability of the contract.

Appeal from a judgment of the superior court for King county, Gay, J., entered January 14, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

[1]Reported in 112 Pac. 937.

Blaine, Tucker & Hyland (James B. Kinne, of counsel), for appellant.

George Olson (Edward Judd, of counsel), for respondent.

FULLERTON, J.—The respondent, Mons Gronning, entered into a contract with the appellant, Elliott Bay Mill & Lumber Company, by the terms of which he agreed to sell it certain saw logs then owned by him located near Hoodsport, in this state. The contract was made in Seattle, at the office of one George Olson, then acting as the attorney for the respondent. At that time the officers of the appellant had not seen the logs, but agreed to take them at the then going price of the log dealer's association, less a certain discount. It is conceded that the association at that time divided saw logs into three grades, known as No. 2, merchantable, and clear, and that the association price for the several grades was six dollars per thousand feet for No. 2, nine dollars per thousand feet for merchantable, and twelve dollars per thousand feet for that denominated clear. It is agreed also that the logs scaled a given quantity of each of the several grades, and that they were duly delivered and received by the appellant. The dispute that gives rise to this action is over the amount of the discount that was agreed to be allowed from the association price. The respondent contends that the discount was to be twenty-five cents on each one thousand feet of logs as shown by the scalers' report of quantities, plus two per centum off for cash; while the appellant contends that the discount was to be twenty-five per centum off the purchase price as determined by the scalers' estimates of quantities, plus two per centum off for cash, or a total, as they estimate it, of twenty-seven per centum less than the price would have been had there been no discount from the association price.

After the logs had been scaled and delivered, the appellant made a statement of the quantities and price in each grade, deducted from the total thereof the discount as contended for by it, and presented the statement with its notes for the

balance to Olson, who, in his capacity as respondent's representative, accepted the notes and receipted the statement. A day or two later the respondent discovered that the discount deducted was not in accord with his understanding of the contract, and brought the present action to recover the difference between the discount as he estimated it and that deducted by the appellant. On the trial the jury returned a verdict in his favor and judgment was entered thereon, from which this appeal was taken.

The appellant first assigns error on the rulings of the court allowing the respondent to question the conclusions of the receipt given at the time payment for the logs was made, on grounds other than fraud, coercion, or mutual mistake. The argument is that the receipt constitutes a written contract between the parties, conclusive and binding upon them until set aside on some equitable ground recognized as sufficient to avoid the solemn written agreement of parties. But the appellant mistakes the nature of this receipt. It was in no sense an agreement between the parties. It did not purport to settle any differences between them. It was an acknowledgment of the payment of a given sum of money on a particular account, nothing more. It did not even recite that the payment was in fact of any particular account, or for any balance due from the one to the other. While it was *prima facie* evidence that the respondent received from the appellant on the day named a given sum of money, it was not conclusive evidence even of that fact, much less was it conclusive evidence that no other or further sum was due. The effect of a receipt in full of all claims and demands arising on account of certain dealings between the parties, given by one party to another, is discussed by this court in *Allen v. Tacoma Mill Co.*, 18 Wash. 216, 51 Pac. 372. In that case we held that even such a receipt could be explained by parol evidence, this language being used:

"It is the contention of the appellant that the exhibit introduced constituted a contract; that the execution of it being

established its construction became a question for the court; and that it was not attacked upon any ground recognized by the law as sufficient to set it aside. We think counsel are mistaken as to the character of the instrument. In our opinion it is a mere receipt, and as such, parol evidence was admissible to explain its provisions, '. . . . . for a receipt is not evidence of a contract, but of payment, and it has always been permitted to show that something short of the actual terms of the receipt was intended; it being conclusive only as to the amount of money paid, and not even for that, provided any mistake can be shown to have taken place in the adjustment between the parties.' *Stackpole v. Arnold*, 11 Mass. 27 (6 Am. Dec. 150). See, also, *Brooks v. White*, 2 Metc. 283 (37 Am. Dec. 95); *Bridge v. Gray*, 14 Pick. 55 (25 Am. Dec. 358); *Shotwell v. Hamblin*, 23 Miss. 156 (55 Am. Dec. 83).

"The rule that permits receipts to be explained or even contradicted by parol evidence in no wise conflicts with the rule upon which appellant's contention is based, viz., that oral testimony is not admissible to vary or contradict a written contract."

The appellant argues, however, that this case was modified by the later case of *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117. But in that case the so-called receipt was a part of a contract of settlement between the parties, entered into for the purpose of adjusting the differences between them growing out of a sale of a mine, and the receipt could not be set aside without in effect vacating the contract of settlement. It is not so in the case at bar. Here there was no special contract of settlement.

The court admitted evidence tending to show the market value of logs at the time of the sale as compared with the association price, and the cost of towing them from the place of delivery to the appellant's sawmill at Seattle, on the theory that these facts tended to show the reasonableness of the several contentions of the parties, and the probability that a person would enter into such a contract as the parties severally contended was entered into in this instance. Evidence of this character was allowed to go to the jury without objec-

tion; in fact, evidence bearing thereon was tendered by each of the parties. The appellant, however, offered to show the price paid for a specific boom of logs purchased by it some few days before the contract was entered into with the respondent. This evidence the court excluded, we think, correctly. Evidence of the market price of logs at the place of delivery at the time the contract was entered into was admissible as tending to show the probability or improbability of the several contentions of the parties as to what the contract actually was, but a specific sale would throw but little if any light upon the question. The market value of logs at that time was the only material question, and a single sale, unless it be made in open market and under the ordinary conditions, affords no evidence of market value. Whether or not the sale was so made was not shown.

The court refused to admit evidence tending to show the quality of the logs delivered under the contract, which also is assigned as error. The purpose of the evidence was, as counsel state, to show the improbability of the appellant's contracting to pay for logs of this grade the prices contended for by the respondent. But the contract was made before the appellant had inspected the logs, it agreeing to pay a fixed price for the several grades as the scaler should report them. It would hardly seem, therefore, that the quality of the logs could in any manner have affected the contract.

The other assignments of error are but different forms of the assignments already noticed, and need no separate consideration.

The judgment is affirmed.

RUDKIN, GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9335. Department One. January 26, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Schwabacher Brothers & Co., Inc., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.[1]

VENUE — FIXING BY AGREEMENT — VALIDITY — PUBLIC POLICY. An agreement in a note that the venue of any action thereon shall be in a particular county, is not void as against public policy, in view of Rem. & Bal. Code, § 216, permitting parties to stipulate that the action may be tried in any county in the state, and §§ 207-209, whereby the court is given jurisdiction regardless of where the action is commenced, and whereby the right to a change to the proper county is waived if not raised at the proper time.

CERTIORARI—WHEN LIES—CHANGE OF VENUE—REMEDY BY APPEAL. Certiorari lies to review an order for a change of venue, since the remedy by appeal is inadequate.

FULLERTON, J., dissents.

Certiorari to review an order of the superior court for King county, Albertson, J., entered December 30, 1910, granting a change of venue in an action upon a promissory note. Reversed.

Leopold M. Stern (W. H. B. Thomas and *H. L. Smith*, of counsel), for relator.

Martin & Barrows and *John E. Humphries*, for respondent.

MOUNT, J.—This case is upon a writ of certiorari to review an order of the superior court of King county, changing the place of trial from King county to Chelan county, in the case of Schwabacher Brothers & Company, Inc., against Don M. Thomas. The facts are as follows: On April 15, 1910, Don M. Thomas, for value, executed and delivered his promissory note for $372.50, to Schwabacher Brothers & Co.,

[1]Reported in 112 Pac. 927.

Inc., payable on or before September 1, 1910. The note contained the following provision:

"And in case suit be brought to collect this note or any part thereof . . . the maker agrees that the venue of said suit or action may be laid in King county, Washington."

On December 7, 1910, after the maturity of the note, Schwabacher Brothers & Co., Inc., brought an action upon said note in the superior court of King county. The complaint was in the usual form. Service was made upon the defendant in Chelan county. On December 8, the defendant appeared in that action and filed a general demurrer to the complaint. He also filed a motion for a change of venue, for the reason that the county designated in the complaint was not the proper county. This motion was accompanied by an affidavit stating that the defendant was served with process in Chelan county, which county was at the time of the commencement of the action, and now is, his *bona fide* residence, and that the defendant is not a resident of King county. Upon this showing the order changing the place of venue was made. Our statutes bearing upon the question are as follows:

"The action must be tried in the county in which the defendants, or some of them, reside at the time of the commencement of the action, or may be served with process, subject, however, to the power of the court to change the place of trial, . . ." Rem. & Bal. Code, § 207.

"If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and demurs or answers, files an affidavit of merits, and demands that the trial be had in the proper county." Rem. & Bal. Code, § 208.

"The court may, on motion, in the following cases, change the place of trial, when it appears, by affidavit or other satisfactory proof,—

"(1) That the county designated in the complaint is not the proper county, ..." Rem. & Bal. Code, § 209.

"Notwithstanding the provisions of section 209, all the parties to the action by stipulation in writing or by consent in open court entered in the records may agree that the place of trial be changed to any county of the state, and thereupon the court must order the change agreed upon." Rem. & Bal. Code, § 216.

It is apparent from these sections that the superior court of King county had jurisdiction both of the subject-matter of the action and of the parties thereto. If that county was not the proper county for the trial, the defendant might demand a change of venue. The question therefore to be determined in this action is, Did the defendant, by the agreement in the note, waive his right to demand a change of venue for the reasons stated in the motion? If the action had been brought originally in Chelan county, the residence of the defendant, there can be no doubt that the parties by stipulation might have agreed to the change to King county, for the statute, at § 216, expressly so provides. The policy of the law, therefore, is that the parties may agree that the place of trial shall be in any county of the state. If the parties may do this after the action is begun, they may certainly do so before; and this is clearly what they did. It is argued by respondent that this agreement in the note is void as against public policy. If the place of trial had been fixed by statute, there would, no doubt, have been force in this position. But, as we have seen above, the policy of this state is that the parties themselves may fix the place of trial in any county of the state, by stipulation in writing or by consent in open court. Cases from states having different statutes are, therefore, not in point, and we are satisfied that the court erred in making the order.

Respondent also asserts that the relator has a complete remedy by appeal. This question was decided adversely to such contention in *State ex rel. Wyman etc. Co. v. Superior Court*, 40 Wash. 443, 82 Pac. 875, 111 Am. St. 915, 2 L. R. A. (N. S.) 568.

The order changing the venue is reversed, and the cause remanded for further proceedings.

Dunbar, C. J., Parker, and Gose, JJ., concur.

Fullerton, J., dissents.

[No. 8233. *En Banc.* January 27, 1911.]

The State of Washington, *on the Relation of Thomas Burke et al., Respondents*, v. Board of County Commissioners of King County *et al., Appellants.*[1]

Appeal—Decision—Jurisdiction—Remand—Recall. After an appeal has been heard, the opinion filed, a petition for rehearing denied, and the remittitur transmitted to the superior court, appellate jurisdiction ceases, and the court cannot, by consent of the parties, recall the remittitur after the term to consider the effect of a subsequent statute.

On petition for rehearing and motion to recall remittitur. Denied.

George F. Vanderveer, Bogle & Spooner, and *Peters & Powell*, for petitioners.

Roger S. Greene, Harold Preston, H. A. P. Myers, and *Corwin S. Shank*, for objectors.

Crow, J.—This cause has heretofore been heard by this court on an appeal prosecuted from a judgment in mandamus, requiring the commissioners of King county to equalize a local improvement assessment levied in aid of the construction of the Lake Washington canal; and on May 28, 1910, in an opinion which states the issues (58 Wash. 511, 109 Pac. 350), a reversal of the judgment and a dismissal of the cause were ordered. Respondent's petition for rehearing was thereafter denied, and on July 19, 1910, the remittitur from this court

[1]Reported in 112 Pac. 929.

was transmitted to the superior court of King county. On June 25, 1910, after the filing of the opinion, the Congress, in an act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes (U. S. Stats. at Large, 1909-10, Ch. 382, at page 666), made the following appropriations:

"Puget Sound Lake Washington waterway: Continuing improvement by the construction of a double lock, with the necessary accessory works, to be located at 'The Narrows,' at the entrance to Salmon Bay, in accordance with the project set forth in House Document Numbered Nine hundred and fifty-three, Sixtieth Congress, first session, one hundred and fifty thousand dollars; and the Secretary of War may enter into a contract or contracts for such material and work as may be necessary to complete said locks and accessory works, to be paid for as funds may be provided from time to time by law, not to exceed in the aggregate two million two hundred and seventy-five thousand dollars, including the amount herein appropriated: *Provided*, That before beginning said work, or making such contract or contracts, the Secretary of War shall be satisfied that King county, or some other local agency, will do the excavation in the waterway above the lock to the dimensions recommended in said project, and will also secure the United States from liability for any claims or damages on account of the grant made to James A. Moore or his assigns by the Act of Congress approved June eleventh, nineteen hundred and six, or on account of the lowering of the level of Lake Washington, raising the level of Salmon Bay, or any other alteration of the level of any part of said waterway.

"Improving waterway connecting Puget Sound with lakes Union and Washington: For maintenance of improvement, five thousand dollars."

A certified copy of a resolution adopted by the commissioners of King county was received by the clerk of this court on October 5, 1910, filed herein, as follows:

"Be it Resolved by the Board of County Commissioners as Follows:—

"Whereas, on the 28th day of May 1910, the supreme court of this state rendered a decision in the case of the

state of Washington, on the relation of Thomas Burke and Frank Hunter, plaintiff and respondent, vs. this board and others, defendants and appellants, reversing the lower court on the ground that the United States government was not intending or proposing to construct or operate the Lake Washington canal; and,

"Whereas, since the filing of said decision the Congress of the United States has passed an act appropriating the sum of two million two hundred seventy-five thousand dollars ($2,275,000) for the construction of locks in said canal, and the respondent has filed a petition for a rehearing of the issue heretofore decided and of the other issues not decided; and,

"Whereas, that board is desirous of continuing the proceedings thereunder in co-operation with the United States government, if it can do so legally, but is reluctant to spend the public funds, or issue bonds under the provisions of said act or place liens upon the thousands of parcels of property embraced in the assessment rolls filed with said board, thereby clouding the title thereto and encumbering the transfer thereof, until *all* the issues in said cause affecting its right to take such further proceedings shall have been decided.

"Now, therefore, in order that the principal purpose of said appeal may be accomplished and this board may be guided in its further proceedings, and be saved a multiplicity of litigation over matters already before said court, the prosecuting attorney is directed to petition for a rehearing of *all* the issues involved in said cause.

"It is not the intent of this resolution or of this board to suggest as to how any point shall be or should be decided, but only to ask a reconsideration of all points having in view said subsequent legislation, in order that the board as a public tribunal shall be able to intelligently and advisedly govern its future proceedings.

"Dated this 18th day of July, A. D. 1910."

At the same time a stipulation between respondents' attorneys and the prosecuting attorney of King county, acting for and on behalf of appellants, was filed, whereby they in writing consented that the remittitur might be returned to this court, and the cause reconsidered. On October 21, 1910, this court, in pursuance of the stipulation entered an order recalling the remittitur and granting a rehearing. When the

cause came on for rehearing, other attorneys heretofore associated with the prosecuting attorney, who also represented other interested parties, appeared and contended that this court is without jurisdiction to recall the remittitur or grant a rehearing.

Citing *Wolferman v. Bell*, 8 Wash. 140, 35 Pac. 603, and *Ward v. Springfield Fire & Marine Ins. Co.*, 12 Wash. 631, 42 Pac. 119, they insist that a petition for rehearing having been heretofore denied, and the remittitur having been filed in the superior court, we have lost jurisdiction; that no further petition for rehearing can be filed or considered; that the term at which our final judgment was rendered has expired; that, if there be any limit of time within which this court would finally lose jurisdiction of the appeal herein, such time has long since passed; that no sufficient reason for recalling the remittitur has been shown; and that this court as an appellate tribunal cannot again acquire jurisdiction by stipulation of the parties. In *Wolferman v. Bell*, *supra*, we said:

"Courts of original jurisdiction generally have the power, for some time after a judgment has been rendered, to set it aside or modify it as legal circumstances may require. The time within which this may be done depends either upon statute or upon the common practice of the courts. Where the latter is the only guide the end of the 'term' has been the universal limit. Of course, if a judgment be void on its face, it may be ignored or attacked in any wise at any time; or, if it has been procured by fraud, it may be set aside on motion within the limited period, or an independent suit to that end may be maintained afterward. But after the time fixed by law, or the well established practice, a judgment which is neither void on its face nor affected by fraud in its procurement or want of jurisdiction, stands for absolute verity; and neither the court which rendered, nor the appellate court which has affirmed it, has jurisdiction to vacate, modify or otherwise affect it. This is the universal rule, and there are no exceptions to it."

In *Titlow v. Cascade Oatmeal Co.*, 16 Wash. 676, 48 Pac. 406, and *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184,

80 Pac. 305, we held that a remittitur might be recalled, upon timely application, for the purpose of enabling this court to correct a mistake made in entering its final judgment. In the former case we said:

"The appellate court has inherent power to correct its judgment during the terms in which the judgment was entered. The respondent under our practice, has no notice of what the judgment is until it is remitted. The presumption must be that the judgment is entered in accordance with the opinion of the court, and it would be a hard and unjust rule to announce that, if by inadvertence or mistake the judgment should be entered not in conformity with the opinion, the respondent would have no redress. We think that in all jurisdictions, under a practice similar to ours, the court has power to recall the remittitur and enforce the judgment according to the opinion rendered in the case."

It is not contended that any such inadvertence has occurred or that any such mistake has been made by not entering judgment in conformity with the opinion heretofore filed in this cause. In fact, it seems to be conceded that the judgment actually entered was in accordance with, and was authorized by, the opinion. The primary purpose for now recalling the remittitur is that this court may determine what effect, if any, the act of Congress above quoted has on the right or duty of the county commissioners to proceed with the further consideration or equalization of the assessment already made, which is the subject-matter of this action. The objection that we are without jurisdiction to recall the remittitur, even upon the stipulation, must be sustained. When the appeal had been determined, the opinion filed, the petition for rehearing denied, and the remittitur transmitted to the superior court, our appellate jurisdiction ceased. Having ceased, it cannot, for the purpose of further considering the same appeal, be again invoked or conferred by an order recalling the remittitur predicated upon a stipulation of the parties. Consent is not sufficient to confer jurisdiction. 11 Cyc. 673.

The act of Congress above referred to, having been passed

after the filing of our former opinion, was not considered by us when the petition for rehearing was denied, and being without jurisdiction to further consider the appeal herein, we cannot and do not now express any opinion as to the effect of that act upon the right or duty of the county commissioners to further consider or now equalize the assessment heretofore made.

The application for a rehearing is denied, and it is ordered that the remittitur be again transmitted to the superior court of King county.

DUNBAR, C. J., RUDKIN, GOSE, MOUNT, PARKER, and CHADWICK, JJ., concur.

MORRIS, J., having been disqualified to act in the main case, took no part on this hearing.

[No. 9186. Department Two. January 28, 1911.]

SUMNER IRON WORKS, *Appellant*, v. PAUL A. WOLTEN, *Receiver of the S. D. Lumber Company, Respondent.*[1]

APPEAL—DECISIONS REVIEWABLE—FINAL ORDERS—AFFECTING SUBSTANTIAL RIGHTS. An order dismissing a claim for specific property against a receiver, which had the effect of sustaining a demurrer to a complaint and required the party to come in as an ordinary creditor, is appealable as a final order determining the proceeding and affecting a substantial right, within Rem. & Bal. Code, § 1716.

RECEIVERS—TITLE TO PROPERTY—CONDITIONAL SALE—RIGHTS OF VENDOR—CLAIMS. Where an insolvent held property under a conditional sale agreement, the vendor may file a claim for the property with the receiver, and is entitled to have the matter heard in the receivership and the property restored to its possession without beginning an action or obtaining leave of court; and such claim is not a waiver of any rights under the contract.

Appeal from an order of the superior court for Whatcom county, Kellogg, J., entered June 11, 1910, dismissing a

[1]Reported in 112 Pac. 1109.

claim against an insolvent, upon sustaining the objections of the receiver. Reversed.

Cooley & Horan and *Robert Mulvihill*, for appellant.

Whitcomb & Montfort, for respondent.

Morris, J.—On February 10, 1909, the Sumner Iron Works sold to the S. D. Lumber Company, under a conditional bill of sale, certain mill machinery. The bill of sale contained the usual provision that title should remain in the Sumner Iron Works until the property was wholly paid for, and that it should have the right to the possession of the property upon default in the payments, retaining the amount paid as the rental use and value of the property. The sale price of the property was $13,017, of which amount $3,254.50 was paid at the time of delivery, and the balance was to be paid in three equal payments in three, seven, and eleven months, with interest at eight per cent. The contract was filed in the auditor's office within ten days from its date, and the Lumber Company took possession of the property. No further payments were paid except $28.62 on June 21, 1909, which was credited on the interest then due upon the deferred payments.

On July 28, 1909, the Lumber Company, upon petition of J. W. Stout, was declared insolvent, and respondent appointed its receiver. He duly qualified as such, and took possession of all the property of the Lumber Company, including the machinery covered by the conditional bill of sale. Thereafter the appellant filed a claim in the receivership case, in which it set forth the terms of the sale of the machinery to the Lumber Company, and the default in the payments as provided for in the contract; asserted its right to the possession of the machinery under the terms of the contract; and asked that it be permitted to remove it, or that it be secured in the payment of the amount then due.

The receiver made a motion to strike this claim, upon the grounds, (1) that the Iron Works had not obtained leave

of court to maintain action against the receiver; (2) that the court had full jurisdiction to ascertain and determine priorities of creditors and to afford ample protection; (3) that no intervention had been sought; and (4) that the Iron Works had filed its proof of claim with the receiver and submitted itself to the jurisdiction of the court and was estopped from claiming a forfeiture of the contract or retaking the property. This motion was granted, and appellant's claim dismissed, and it brings this appeal.

Respondent moves to dismiss the appeal, upon the ground that the order granting his motion and dismissing appellant's claim is not an appealable order. In support of this contention, respondent argues that the court below treated his motion as a demurrer, and that an order sustaining a demurrer is not appealable. It is true we have so held, and such is still the rule. A plaintiff to whose complaint a demurrer has been sustained may plead over, or he may elect to stand on his plea and appeal from the subsequent order of dismissal, should such an order be entered. This is, in effect, the situation here. Appellant could not amend its claim. It had stated the whole situation upon which is based its claim to retake the machinery; and when the court held, as a matter of law, that it had no right to retake the machinery, but must submit its claim as an ordinary creditor for the amount claimed to be due and take its chances upon a distribution, it was in effect a final order depriving it of the right to recover the possession of the machinery, and in effect determining the proceedings, so far as appellant sought to enforce its rights under the conditional bill of sale. It could hardly be said that such an order did not affect a substantial right of appellant to have its interest in the machinery determined in the receivership case upon its plea of title and ownership. Rem. & Bal. Code, § 1716, provides for an appeal, "(6) From any order affecting a substantial right in a civil action or proceeding, which either (1) in effect determines the action or proceeding and prevents a final judgment therein; or (2)

discontinues the action." We believe the order dismissing appellant's claim was such an order and appealable. The motion to dismiss is therefore denied.

Coming now to the merits, it is well settled in this state that, under a contract such as between the appellant and the Lumber Company, title does not pass, and that such a reservation of title is enforceable against third parties. *Kidder v. Wittler-Corbin Mach. Co.*, 38 Wash. 179, 80 Pac. 301. Appellant, therefore, had two courses it might pursue: it could assert its title to the machinery as against the receiver and claim the possession thereof; or it could surrender and waive its right so to do, and come in under a general creditors' claim. It chose the former, and having done so, it was the duty of the receiver to report the demand to the court and ask for instructions. It would have been the court's duty to thereupon inquire into the demand, and if it found it well taken, to order the receiver to comply therewith and surrender the machinery or pay the balance due. The receiver could obtain no better or different title or claim to the machinery than the insolvent lumber company. Its rights were his rights; no more, no less. The adjudication of the insolvency of the lumber company and the appointment of a receiver in no wise established any lien upon this machinery. It remained with the receiver, as with the lumber company, subject to the assertion of appellant's title because of the default in the deferred payments. *York Manufacturing Co. v. Cassell*, 201 U. S. 344; *Risk v. Kansas Trust & Banking Co.*, 58 Fed. 45; *Ardmore Nat. Bank. v. Briggs Mach. & Supply Co.*, 20 Okl. 427, 94 Pac. 533, 129 Am. St. 747. The appointment of a receiver could not give the Lumber Company any additional contractual rights, nor deprive it of any old ones. Nor was the filing of this claim in the receivership case any waiver of any right granted appellant under the contract. Its debtor, by the order of the court, had been deprived of its possession of the machinery, and it was right and proper to pray the court which had, by its adjudication of

insolvency and appointment of receiver, assumed jurisdiction over all property and property rights of the insolvent debtor, to uphold the contract and enforce its rights. In doing this, there was no necessity for an action against the receiver, nor any leave of court. All that was required was to call the attention of the court to the facts; and that it did so by filing its demand with the receiver, as creditors are wont to file their claims, did not deprive it of any of its rights under its contract, nor reduce its right to the machinery to that of a general creditor without specific lien.

The order appealed from is reversed, and the cause remanded to the court below for such proceedings as are herein indicated.

DUNBAR, C. J., RUDKIN, and CROW, JJ., concur.

CHADWICK, J. (concurring)—A petition filed in a receivership proceeding is not an action against the receiver, within the meaning of the rule requiring leave to sue, and in reviewing the order striking the petition from the files we are not required or permitted to look beyond the face of the petition itself. On its face, it discloses a clear right in the appellant to either a return of its property or the payment of the balance due on the purchase price. If there is a defense to the petition not appearing on its face, it must be presented by answer and not by motion. I concur in the judgment of reversal.

[No. 9163. Department One. December 12, 1910.]

W. N. COLER, JR., *Respondent*, v. LEWIS W. CENTER, *Appellant*.[1]

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 13, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

A. H. Garretson and *Jesse Thomas*, for appellant.
Frank D. Nash, for respondent.

PER CURIAM.—This action was brought by the respondent under § 785 of Rem. & Bal. Code, to recover from the appellant the possession of certain lands situated in Pierce county of which the respondent alleged he was the owner in fee, to quiet his title thereto, and to enjoin the defendant from asserting rights therein, or otherwise interfering with the property. In his complaint the respondent deraigned his title from the government of the United States, showing a complete record title to the property in himself. The appellant in defense pleaded the statute of limitations, alleging that he had been in the open, notorious and exclusive possession of the property under a claim or right for a period of more than ten years next preceding the commencement of the action. The court on the trial, which was had without the intervention of a jury, found for the respondent, and entered judgment in his favor. This appeal followed.

There is no serious difference between the parties over the rules of law involved. The questions discussed are principally questions of fact, and these questions, we think, the trial court correctly resolved in favor of the respondent. The respondent's evidence shows a complete record title to the property in himself, and we think the appellant failed to show any such open, notorious and continuous possession for the required period as would ripen into a right by adverse possession. It would serve no useful purpose to review the evidence. It is sufficient to say that we have examined it and are satisfied with the conclusions drawn therefrom by the trial judge.

The judgment is affirmed.

[1]Reported in 112 Pac. 94.

[No. 9071. Department Two. December 21, 1910.]

B. C. MOSBY, *as Receiver of Spokane Columbia River Railroad and Navigation Company, Appellant*, v. H. T. AHRENS, *as Receiver of the Farmers' Grain & Supply Company, Respondent.*[1]

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 12, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury. Affirmed.

B. C. Mosby, pro se.

Merritt, Oswald & Merritt, for respondent.

PER CURIAM.—This is a controversy between two insolvent corporations, through their receivers, the plaintiff (appellant here) suing for the sum of $19,891.19, with interest from a certain date. The case was tried by the court, who found the facts from which was deduced the judgment in favor of the respondent, the court finding that the evidence did not sustain the allegations of the complaint.

The record in this case is somewhat voluminous, but we have examined in detail the testimony of the plaintiff offered in support of the allegations of the complaint, and the testimony offered in rebuttal, as well as the testimony of the defendant, and from such examination we are not able to conclude that the findings of the court were not justified by the evidence. It appears that the findings supported the judgment. An analysis of the testimony in this case would be of no benefit to the parties to the action, and could not be applicable to any other litigation; hence, an indulgence in it would be profitless. What learned counsel for the appellant terms technical errors assigned are without merit.

The judgment will be affirmed.

[1]Reported in 112 Pac. 1135.

ACCOUNT:

Fraud in making accounting, see FRAUD, 5.
Accounting by trustee, see TRUSTS, 2.

1. ACCOUNT—TRUSTS—INTEREST. Upon an accounting of a trust running over many years, the trustee should not be charged interest on sums received which were by him applied to the payment of interest-bearing obligations, he having reaped no personal benefit from the trust funds, and the owners of the funds not having sustained the loss of their use; but he is liable for interest on sums received and not accounted for by him. *Feighan v. Reeves*..... 465

2. ACCOUNT—PARTIES ENTITLED—TRUSTS. Upon an accounting by a trustee, the trustee is not entitled to an accounting by a predecessor, there having been no privity of contract or relationship between them, and the first trustee having been in charge when there was no profit in the property, and the interests of the second trustee being confined to a share in net profits. *Feighan v. Reeves*..... 465

ACTION:

To compel rendition of account, see ACCOUNT.
Assignment of right of action, see ASSIGNMENTS.
On negotiable instruments, see BILLS AND NOTES.
Establishment of boundaries, see BOUNDARIES.
Against carrier for loss of or injury to live stock, see CARRIERS, 1-4.
On contracts, see CONTRACTS.
By or against corporations, see CORPORATIONS.
Breach of covenant, see COVENANTS.
On accident insurance policy, see DEATH.
For divorce, see DIVORCE.
Suits in equity, see EQUITY.
For injuries from blasting, see EXPLOSIVES.
Injury from fire spreading from railroad right of way, see FIRES.
For fraud, see FRAUD.
For injuries to driver of horse frightened at automobile, see HIGHWAYS, 2-5.
For obstruction of highway, see HIGHWAYS, 1.
On injunction bond, see INJUNCTION, 2.
Restraining action at law, see INJUNCTION, 1.
On insurance policy, see INSURANCE.
Bar by former adjudication, see JUDGMENT.
Limitation of statute, see LIMITATION OF ACTIONS.
By servant for blacklisting, see MASTER AND SERVANT, 1.
By servant for personal injuries, see MASTER AND SERVANT.
Foreclosure of mechanics' lien, see MECHANICS' LIENS.
For damages by flooding from defects in sewer, see MUNICIPAL CORPORATIONS, 24.
Enjoining canvass of illegal city election for annexation of territory, see MUNICIPAL CORPORATIONS, 4.
For injuries to person or property in general, see NEGLIGENCE.

ACTION—CONTINUED.
Condition precedent to suit by firm, see PARTIES.
Fraud of agent in sale of land, see PRINCIPAL AND AGENT, 2.
Compensation of agent, see PRINCIPAL AND AGENT, 1.
Determination of adverse claims to real property, see QUIETING TITLE.
By or against receivers, see RECEIVERS.
Reformation of written instrument, see REFORMATION OF INSTRUMENTS.
For price of goods sold, see SALES, 3-5.
Rescission of sale of personal property by buyer, see SALES, 1, 2.
Against street railroads for personal injuries, see STREET RAILROADS, 18.
Recovery of tax paid, see TAXATION.
For conversion of goods, see TROVER AND CONVERSION.
Establishment and enforcement of trust, see TRUSTS.
By vendor for rescission of contract for sale of land, see VENDOR AND PURCHASER, 4, 5.
Venue of by agreement, see VENUE.

1. ACTIONS—MISJOINDER OF CAUSES—INJUNCTION—BONDS. An action upon an injunction bond indemnifying the plaintiff to the extent of $500 is not demurrable on the ground of misjoinder of causes of action, from the fact that it alleges damages and prays for judgment in excess of the amount of the bond, where all the damages alleged were of such a nature as to be secured by the bond up to the amount limited thereon. *Maughlin Mill Co. v. Hamilton*..... 66

ADEQUATE REMEDY:
Adequacy of remedy by appeal, see CERTIORARI.
By appeal as bar to mandamus, see MANDAMUS.

ADJOINING LANDOWNERS:
Boundaries, see BOUNDARIES.
Liability to assessment for public improvements, see MUNICIPAL CORPORATIONS, 6-19.

ADJUDICATION:
Operation and effect of former adjudication, see JUDGMENT.

ADMINISTRATION:
Of estate of decedent, see EXECUTORS AND ADMINISTRATORS.

ADMISSIONS:
Creating estoppel, see ESTOPPEL, 2.
As evidence in civil actions, see EVIDENCE, 5.
Of codefendant as evidence, see FALSE PRETENSES, 1.

ADVERSE CLAIM:
To real property, see QUIETING TITLE.

ADVERSE POSSESSION:

1. ADVERSE POSSESSION—GOOD FAITH—NECESSITY. The grantee in a quitclaim deed having knowledge that the grantor was a stranger to the title and that the title was vested in another, cannot show good faith or gain title by adverse possession, under Rem. & Bal. Code, § 788, giving title by adverse possession under claim and color of title made in good faith, and the payment of taxes for seven years. *Petticrew v. Greenshields* 614

2. ADVERSE POSSESSION—VACANT LAND—ACTS OF OWNERSHIP. The occasional hauling of wood for domestic use from a tract of 640 acres of land, wholly unoccupied and unimproved, is not such an act of adverse possession as to indicate a claim of title. *Petticrew v. Greenshields* 614

AFFIDAVITS:

Of attorney on motion for new trial, see NEW TRIAL, 1.
Of witnesses on motion for new trial, see NEW TRIAL, 6.
Of jurors on motion for new trial, see NEW TRIAL, 9.

AGENCY:

See PRINCIPAL AND AGENT.

AGREEMENT:

See CONTRACTS.
In note fixing venue of action, see VENUE.

ALIMONY:

In action for divorce, see DIVORCE, 1.

ALTERATION OF INSTRUMENTS:

See REFORMATION OF INSTRUMENTS.

AMENDMENT:

On appeal or writ of error, see APPEAL AND ERROR, 14.
Of criminal complaint, see CRIMINAL LAW, 1.
Mechanics' lien claim, see MECHANICS' LIENS, 3.
Of pleading, see PLEADING, 1.

ANIMALS:

Carriage of live stock, see CARRIERS.
Larceny of, see LARCENY.

ANNEXATION:

Of territory to municipal corporation, see MUNICIPAL CORPORATIONS, 3, 4.

APPEAL AND ERROR:

Review of discretion in appointing commissioners to establish boundaries, see BOUNDARIES, 2.

Costs on modification, see COSTS, 3.

Criminal appeals, see CRIMINAL LAW, 1, 12-15.

Remedy by appeal or writ of error as barring mandamus, see MANDAMUS.

Assessment for public improvements, see MUNICIPAL CORPORATIONS, 16, 19.

Review of discretion in ruling on motion for new trial, see NEW TRIAL, 6.

From decision of medical board refusing license to practice, see PHYSICIANS AND SURGEONS.

Review of acts or decisions respecting regulation or operation of street car service, see STREET RAILROADS, 6-10.

Remarks of judge, see TRIAL, 1, 2.

III. DECISIONS REVIEWABLE.

1. APPEAL—DECISIONS REVIEWABLE—FINAL ORDERS — AFFECTING SUBSTANTIAL RIGHTS. An order dismissing a claim for specific property against a receiver, which had the effect of sustaining a demurrer to a complaint and required the party to come in as an ordinary creditor, is appealable as a final order determining the proceeding and affecting a substantial right, within Rem. & Bal. Code, § 1716. *Sumner Iron Works v. Wolten*..... 689

IV. RIGHT TO APPEAL.

2. APPEAL — DISMISSAL — CESSATION OF CONTROVERSY. Upon appeal from the dismissal of an action to enjoin a city from letting a contract for a city bridge, there is no cessation of the controversy warranting a dismissal of the appeal from the fact that the city has since let the contract to enjoin which the action was commenced. *Graff v. Tacoma*..... 186

V. PRESERVATION AND RESERVATION IN LOWER COURT.

3. APPEAL—OBJECTIONS—ADMISSION OF EVIDENCE. Error cannot be predicated on the admission of evidence unless the specific objection urged was made at the trial. *Hall v. Northwest Lumber Co*.... 351

4. APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS—TIME FOR TAKING. Exceptions to instructions, not taken at the trial but filed in writing with the clerk thereafter, are not taken in time, and error cannot be assigned thereon. *Gerber v. Aetna Indemnity Co*..... 184

5. SAME—MANNER OF TAKING. An oral request for qualification of instructions about to be given, and argument thereon wherein appellant's counsel claimed that it would be error to refuse the request, cannot take the place of exceptions, and error cannot be assigned thereon when no exceptions were taken to the action of the court. *Gerber v. Aetna Indemnity Co*..... 184

APPEAL AND ERROR—CONTINUED.

6. APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Written exceptions to instructions filed with the clerk and not in any way considered by the court are insufficient. *White v. Ratliff*..... 383

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

7. APPEAL—PARTIES—NOTICE. An appeal will not be dismissed for failure to serve a notice of appeal upon two corporations, one domestic and one foreign, named in defaults entered, where the complaint alleged that defendant was a domestic corporation, which was denied in an answer alleging that the defendant was a foreign corporation authorized to do business in this state, the sheriff's return did not show whether a foreign or domestic company had been served, and the motion to dismiss by the foreign corporation did not show affirmatively that there was any domestic corporation, the record indicating but one defendant. *Beebe v. Northwestern Dairy Co.* 294

X. RECORD.

8. APPEAL — RECORD — FINDINGS — REVIEW. Upon a question as to breach of covenant in a deed of certain lots, the contention that part of the lots are claimed by a city as a street cannot be considered on appeal, in the absence of the evidence on the subject, or any finding thereon by the trial judge. *Cameron v. Burke*..... 203

9. SAME—STATEMENT OF FACTS — CONTENTS — CERTIFICATE. A statement of facts containing the evidence in narrative form is sufficient when certified to contain all the material evidence and testimony introduced upon the trial. *Delaski v. Northwestern Improvement Co.* 255

10. APPEAL—RECORD—STATEMENT OF FACTS—TIME. Where the last day for filing a statement of facts falls on Sunday, it may be filed on the following day, under Rem. & Bal. Code, § 252. *Delaski v. Northwestern Improvement Co*..... 255

11. APPEAL—RECORD—STATEMENT OF FACTS—TIME FOR FILING. Under Rem. & Bal. Code, § 393, a statement of facts not filed within the time required by law, when no extension has been granted, will be struck out, and the judgment affirmed where no questions are presented outside of the statement. *Russell v. Mitchell*..... 178

XVI. REVIEW.

12. APPEAL—TRIAL DE NOVO—ISSUES. The requirement of a trial *de novo* on appeal to the superior court only requires a trial upon the matters in issue. *In re Littlefield*..... 150

APPEAL AND ERROR—CONTINUED.

13. APPEAL—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR. One alleged to be the wife of a defendant is not prejudiced by a judgment establishing the community character of his debt without any proof of the marriage relation, where no personal judgment was taken against her. *White v. Ratliff* 383

14. APPEAL—REVIEW—FINDINGS—PLEADINGS—AMENDMENT. In the absence of a statement of facts, the evidence is presumed to support the findings, and the pleadings will be deemed amended to conform thereto. *Holden v. Romano* 458

15. APPEAL—REVIEW—VERDICT. A verdict supported by ample and competent testimony will not be reversed on appeal. *Green v. Dungan* 65

16. APPEAL—REVIEW—VERDICTS. Findings of a jury, supported by competent evidence, are conclusive on appeal. *Sexsmith v. Brown* 164

17. APPEAL—REVIEW—VERDICT. The verdict of a jury upon conflicting testimony is conclusive on appeal... *Merrill v. Stevens & Co.* 28
White v. Ratliff 383

18. APPEAL—REVIEW—VERDICT. A verdict upon conflicting evidence, sustained by the respondent's testimony, will not be reversed on appeal. *Berger v. Metropolitan Press Printing Co* 35

19. APPEAL—REVIEW — FINDINGS. Findings upon directly conflicting evidence of witnesses, seen and heard by the trial court, should not be disturbed on appeal. *Jones v. Nelson* 167

20. APPEAL—REVIEW—FINDINGS. Findings upon absolutely conflicting evidence where the trial judge saw the witnesses will not be disturbed on appeal. *Jones v. Kehoe* 422

21. APPEAL—REVIEW—FINDINGS. Findings upon very conflicting evidence will not be disturbed on appeal. *Jaggy v. Rooney* 381

22. APPEAL—REVIEW—FINDINGS. Findings will not be reversed on appeal because of conflict in the testimony, or because the greater number of witnesses testified to the contrary. *Hughes & Co. v. Flint* 460

23. APPEAL—REVIEW—FINDINGS. In the absence of the evidence, findings to the effect that certain property of a divorced couple had been their community property cannot be disturbed on appeal, although in the divorce case it was found that there was no community property. *Barkley v. American Savings Bank & Trust Co* 415

24. APPEAL—REVIEW—FINDINGS. Findings not being essential in equity, judgment will not be reversed for insufficiency of the findings to support the decree, the findings not showing affirmatively that a different judgment should have been entered. *Holden v. Romano* 458

APPEAL AND ERROR—CONTINUED.

25. APPEAL—REVIEW—HARMLESS ERROR—ADVISORY REPORT. Error cannot be predicated upon the failure of a commissioner to take the oath, where his report is only advisory and the court heard other evidence. *Jaggy v. Rooney* 381

26. APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS. In an action for personal injuries tried to the court, error in denying a motion for judgment on the pleadings is error without prejudice, where there was a full trial on the merits and no competent evidence rejected or incompetent evidence received by reason of the state of the pleadings. *Lasityr v. Olympia* 651

27. APPEAL—REVIEW—HARMLESS ERROR. Comment on the evidence that is not prejudicial is not ground for reversal. *State v. McDowell* 398

28. APPEAL—MISCONDUCT OF JUDGE—TRIAL—POLLING JURY. It is not prejudicial error, in polling a jury, for the court to make additional inquiries as to how each juror found on certain questions. *Hall v. Northwest Lumber Co* 351

29. APPEAL—REVIEW—HARMLESS ERROR—TRIAL—MISCONDUCT OF COUNSEL. It may not be prejudicial error, on exception to misstatements of the counsel in argument, to refuse to interfere with the course of the argument and further charge the jury, where the court, on objections made, referred to the written instructions given, wherein the duty of the party was clearly defined. *Lasityr v. Olympia*.. 651

30. APPEAL—REVIEW—HARMLESS ERROR. It is not prejudicial error to refuse to strike out an immaterial opinion of a witness. *State v. Leroy* 405

31. APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated upon an immaterial statement of a witness as to trivial incidents which did not reach the dignity of evidence. *State v. Leroy*... 405

32. APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence and in instructions to the jury cannot be complained of by the plaintiff where the jury resolved all the issues in favor of the plaintiff. *Bluher v. Earles* 84

33. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. Error in the admission of evidence of another explosion in the same mine is harmless, where on its appearing that the witness was not present, the evidence was stricken and the jury instructed to disregard it. *Mrozevich v. Western Steel Corporation* 668

34. APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated on the sustaining of an objection to testimony, where all the evidence of the witness was admitted under other questions. *Shaw v. Woodland Shingle Co* 56

APPEAL AND ERROR—CONTINUED.

35. APPEAL—REVIEW—HARMLESS ERROR—COUNTERCLAIM — EXCLUSION. It is not prejudicial to exclude evidence of damages under a counterclaim for trespass, in an action upon an injunction bond which restrained the plaintiff from cutting timber on defendants' lands, where the principal issue was over the plaintiff's right to the timber conveyed to him by a deed prior to defendants' deed to the land, and both parties were allowed to introduce their evidence on this issue, which was resolved in favor of the plaintiff. *Maughlin Mill Co. v. Hamilton*..... 66

36. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. It is not prejudicial error to permit little more than a mere incidental reference to earning capacity under a complaint failing to allege loss in that respect. *Horton v. Seattle*..... 301

37. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—RELEVANCY. In an action for the loss of an eye through the lodgment of a cinder, it is not prejudicial error to exclude evidence of experts as to the frequency of a loathsome disease, the effect of which might have been a disease of the eye, resulting in its loss, where it was shown that the eye was treated for such disease and the expert was allowed to go into the history of the germ and explain the manner of its detection, as his testimony was not restricted. *Coffer v. Erickson* 559

38. APPEAL—REVIEW—HARMLESS ERROR. Where the jury found that the plaintiff was the owner of a building destroyed by fire, it is not prejudicial error that the court excluded evidence of the bad fire record of one F., whom the defendant claimed to be the owner of the building. *Silver v. London Assurance Corporation*..... 593

39. APPEAL—REVIEW—HARMLESS ERROR—VERDICT. Where the jury returns the only verdict that could have been rendered under the evidence, intermediate errors as to the form of the action or error in instructions are harmless. *Manvell v. Weaver*..... 23

40. SAME—INSTRUCTIONS. Errors in submitting instructions as to the measure of damages on a certain item is harmless where it appears from the verdict of the jury that such item did not figure in the verdict. *Manvell v. Weaver*..... 23

41. APPEAL—REVIEW—HARMLESS ERROR — INSTRUCTIONS — DAMAGES—EARNING CAPACITY. An instruction as to plaintiff's impaired earning capacity, is not prejudicial error, where the sum awarded was probably limited by the maximum recovery allowed by statute, and no other jury would likely give a less sum. *Cook v. Danaher Lumber Co.* 118

42. APPEAL—REVIEW—HARMLESS ERROR. Errors in instructions are harmless where the jury was not misled, and the only question in the case was one of law for the determination of the court. *McAdam v. Russell* 176

APPEAL AND ERROR—CONTINUED.

43. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It is not prejudicial error requiring a reversal of the case that the duty of the owner of a coal mine was defined by reference to what "could" have been done instead of what "should" have been done to render the place safe, where the true tests were given in other instructions and it does not appear that the jury were misled. *Cox v. Wilkeson Coal & Coke Co*..... 343

44. APPEAL — HARMLESS ERROR — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. An instruction upon the subject of contributory negligence is not prejudicial error in stating that the plaintiff must not "blindly and heedlessly rush into a place of danger," when, as coupled with other correct instructions, the jury could not have been misled. *Coffer v. Erickson*..... 559

45. APPEAL—REVIEW—HARMLESS ERROR—NEW TRIAL. Upon a trial *de novo* in the supreme court, the denial of a motion for a new trial, heard in the wrong county, is not prejudicial, the new trial having been properly denied. *Jones v. Nelson*..... 167

46. APPEAL—DECISION—LAW OF CASE. Upon a retrial, the decision on a former appeal becomes the law of the case, and is conclusive. *Manvell v. Weaver*..... 23

47. APPEAL—DECISION—LAW OF CASE. The decision of the supreme court on a former appeal becomes the law of the case. *Berger v. Metropolitan Press Printing Co*..... 35

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

48. APPEAL — DECISION — LAW OF CASE — REMAND — QUESTIONS CONCLUDED. Where, upon appeal, the rights of the parties are determined except as to the amount of taxes paid, and the cause is remanded for the purpose of ascertaining the amount, the decision becomes the law of the case, and on the remand no other question can be presented. *Dalgardno v. Trumbull*..... 659

49. APPEAL—DECISION—JURISDICTION — REMAND — RECALL. After an appeal has been heard, the opinion filed, a petition for rehearing denied, and the remittitur transmitted to the superior court, appellate jurisdiction ceases, and the court cannot, by consent of the parties, recall the remittitur after the term to consider the effect of a subsequent statute. *State ex rel. Burke v. Board of County Commissioners* 684

APPLIANCES:

Liability of employer for defects, see MASTER AND SERVANT.

APPLICATION:

Of payment on other account by drawee of check with notice, see BILLS AND NOTES, 3.

By materialman of payment received from contractor, see MECHANICS' LIENS, 4.

APPOINTMENT:

Of commissioners to establish disputed boundary, see BOUNDARIES, 2, 3.

ASSAULT:

Conviction of offense included in charge, see INDICTMENT AND INFORMATION, 2.

Assault with intent to rape, see RAPE.

ASSESSMENT:

Of benefits to property by commercial waterway district, see CONSTITUTIONAL LAW, 3.

For public improvements, see MUNICIPAL CORPORATIONS, 6-19.

ASSIGNMENTS:

Of preference right to purchase tide lands, see PUBLIC LANDS.

1. ASSIGNMENTS—ACTION IN TORT—SURVIVAL—DAMAGES FROM FIRE. A right of action for damages caused by a fire negligently set out, survives to the personal representative, and is therefore assignable. *Jordan v. Welch* 569

ASSOCIATIONS:

1. ASSOCIATIONS—MEMBERSHIP—EXPULSION—NOTICE—NECESSITY. A league of baseball clubs or associations acts without jurisdiction in the expulsion of a member without notice and an opportunity to be heard; and the presence of the member without previous notice of the action does not confer jurisdiction, when such member does not consent. *State ex rel. Rowland v. Seattle Baseball Association* .. 79

2. ASSOCIATIONS—MEMBERSHIP—EXPULSION—BY-LAWS — REPEAL. A section in a constitution of a league of baseball clubs or associations providing that the membership of a club may be terminated by a unanimous vote of the remaining clubs, while only a by-law, is not repealed by a resolution amending a one-year franchise granted by resolution so as to grant a franchise or membership for the term of five years; there being no reference to the constitution, and nothing to show that the resolution was unanimous. *State ex rel. Rowland v. Seattle Baseball Association* 79

3. ASSOCIATIONS—MEMBERSHIP—TERMINATION. A baseball club may be deprived of its membership in a league under a clause in the constitution providing for the expulsion of a club on the unanimous vote of the other members if for business reasons the same appears desirable. *State ex rel. Rowland v. Seattle Baseball Association* 79

4. ASSOCIATIONS—MEMBERSHIP—REINSTATEMENT—MANDAMUS —WHEN LIES. Where the membership of a baseball club in a league was illegally terminated without giving required notice, the courts will not by mandate enforce its reinstatement where it appears that it

ASSOCIATIONS—CONTINUED.

will be expelled on due notice, under a clause in the constitution authorizing such expulsion for business reasons, by a unanimous vote of the remaining members. *State ex rel. Rowland v. Seattle Baseball Association* 79

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 18-24, 33, 50, 51.

ATTACHMENT:

Notice to *bona fide* purchaser of community property from wife, see HUSBAND AND WIFE, 1.

ATTORNEY AND CLIENT:

Allowance of attorney's fee to stockholder in action on behalf of corporation, see CORPORATIONS, 4.

Attorney's fees in action for divorce, see DIVORCE, 2.

Attorney's fees on foreclosure of mechanic's lien, see MECHANICS' LIENS, 7.

AUTHORITY:

Of broker, see BROKERS, 1.

Of corporate officers or agents, see CORPORATIONS, 5.

Of commissioner of public works to award contract upon bids for bridge, see MUNICIPAL CORPORATIONS, 5.

AUTOMOBILES:

Injury to driver of horse frightened at automobile, see HIGHWAYS, 2-5.

AWARD:

Of contract for public improvements, see MUNICIPAL CORPORATIONS, 5.

BAR:

Of action by former adjudication, see JUDGMENT.

Of action by limitation, see LIMITATION OF ACTIONS, 2.

Adequate remedy by appeal as bar to mandamus, see MANDAMUS.

BASEBALL:

Termination of membership in baseball league, see ASSOCIATIONS.

BENEFITS:

Assessment of benefits caused by construction of public improvements, see MUNICIPAL CORPORATIONS, 6, 10-15, 17-19.

BIDS:

Contracts with municipality, see MUNICIPAL CORPORATIONS, 5.

BILLS AND NOTES:

Authority of officers to execute notes on behalf of corporation, see CORPORATIONS, 5.

Waiver of demurrer in action on draft, see PLEADING, 2.

Agreement in note fixing venue, see VENUE.

1. BILLS AND NOTES—DRAFTS BY AGENT ON PRINCIPAL—RIGHTS OF HOLDER. Where a sight draft is drawn by an agent upon his principal in payment of logs purchased for the drawee, the effect is that of a bill drawn upon the drawer himself, which the holder may treat as a promissory note, under Rem. & Bal. Code, § 3520. *Clemens v. Stanton Co.* 419

2. BILLS AND NOTES—INDORSEES—HUSBAND AND WIFE—COMMUNITY PROPERTY. *Semble*, that a husband and wife, as joint indorsees of a negotiable instrument, sustain the same relation to a third party in reference to it as any other joint holders, irrespective of community rights. *Barkley v. American Savings Bank & Trust Co.*..... 415

3. BILLS AND NOTES—HOLDER IN DUE COURSE—PAYMENTS—APPLICATIONS—MECHANICS' LIENS. Where a check drawn in favor of a building contractor is marked "on contract" and the drawee had notice of the contract and had opened a separate account with the contractor thereon, the drawee on paying the check is not a holder in due course, under Rem. & Bal. Code, § 3443, and cannot apply the payment to other accounts of the contractor. *Hughes & Co. v. Flint* 460

4. BILLS AND NOTES—MATURITY—INSTALLMENTS DUE—OPTION—TIME FOR EXERCISING. An option to declare the principal of a note due for default in the payment of interest, time not being made of the essence of the contract, cannot be exercised after the default is purged by payment of the interest to the depositary appointed to collect and receive the payments. *Heckert v. Hilscher*..... 269

BLASTING:

Opinion evidence as to use of barricade to protect workmen, see EVIDENCE, 9.

Injuries from blasting, see EXPLOSIVES.

Death of coal miner from negligent firing of blast, see MASTER AND SERVANT, 14, 29, 41.

BONA FIDE PURCHASER:

Attachment as notice to subsequent purchaser of community property from wife, see HUSBAND AND WIFE, 1.

Of lands, see VENDOR AND PURCHASER, 7, 8.

BONDS:

Misjoinder of causes in action on injunction bond, see ACTION.

Injunction bonds, see INJUNCTION, 2.

Sureties on bonds, see PRINCIPAL AND SURETY.

BOUNDARIES:

Of plat, see DEDICATION.

1. BOUNDARIES—PLATS—GRANTS—DETERMINATION OF LINES. Where a plat fails to give the east line of certain platted lots, or the dimensions of the side lines, the intention of the plattors is to be given effect by applying the map scale to the side lines, ascertaining the length of the three sides given, and determining therefrom the other missing line. *Cameron v. Burke*..... 203

2. BOUNDARIES—COMMISSIONERS TO ESTABLISH—DISCRETION—REVIEW. Under Rem. & Bal. Code, § 948, providing for the appointment of commissioners, not exceeding three, to establish disputed boundaries and make an advisory report to the court, the appointment of commissioners is discretionary, and not subject to review on appeal. *Jaggy v. Rooney*..... 331

3. SAME—NUMBER OF COMMISSIONERS. Under Rem. & Bal. Code, § 948, a single commissioner may be appointed to establish a disputed boundary. *Jaggy v. Rooney*..... 331

BREACH:

Of contract as ground for cancelling deed, see CANCELLATION OF INSTRUMENTS, 1.

Of contract, see CONTRACTS.

Of covenants, see COVENANTS.

Damages for breach of contract by delay in completing building, see DAMAGES, 2.

Suspension of policy for breach of conditions, see INSURANCE, 3.

BRIDGES:

Drawbridge obstructing private property as ground for compensation, see EMINENT DOMAIN, 2.

Injury to foot passenger on bridge from cinder thrown by locomotive, see MUNICIPAL CORPORATIONS, 21, 23.

Award of contract for bridge by commissioner of public works, see MUNICIPAL CORPORATIONS, 5.

BROKERS:

Admissions creating estoppel, see ESTOPPEL, 1.

Agreement between to divide commissions as within statute of frauds, see FRAUDS, STATUTE OF.

Liability of agent for fraud in sale of land, see PRINCIPAL AND AGENT, 2.

1. BROKERS—CONTRACT—AUTHORITY TO MAKE. Where brokers exceeded their authority by reducing the price, including a guaranty and guaranteeing the number and kind of apple trees, their contract of sale is not binding upon their principal, especially when made subject to his approval. *Smith v. Craig*..... 523

BROKERS—CONTINUED.

2. SAME—RATIFICATION OF CONTRACT. In such a case, the contract as made is not ratified by the fact that the owner thereafter offered to consent to the reduced price, agreeing to make a list of the trees, although the brokers thereupon struck out the guarantee as to the trees. *Smith v. Craig*..... 528

3. BROKERS—COMMISSIONS—SALE BY OWNER—REASONABLE VALUE OF SERVICES. An owner is liable for the reasonable value of a broker's services, where, after listing the property at a certain price, he made a sale at a less price, sought the broker's aid in effecting the sale, and recognized his services by endeavoring to reach a new agreement with him as to the commissions to be paid. *Peterson v. St. Francis Hotel Co.*..... 378

4. BROKERS — CONTRACT FOR COMMISSIONS. A contract between brokers to divide commissions on a certain sale means net commissions, after deducting necessary expenses. *Jones v. Kehoe*..... 422

BUILDINGS:

Building contracts, see CONTRACTS, 5.
Damages for delay in completing building, see DAMAGES, 2.
Right of tenant to recover price of building erected upon sale of premises by lessor, see LANDLORD AND TENANT, 2.
Condition of premises for use of lessee, see LANDLORD AND TENANT, 1, 3.
Affected by mechanics' liens, see MECHANICS' LIENS.

BURDEN OF PROOF:

To show increase of hazard, see INSURANCE, 4.
To show extension of heading in coal mine, see MASTER AND SERVANT, 34.
To show unreasonable regulation of the frequency of street car service, see STREET RAILROADS, 17.

BURGLARY:

Evidence of identity of accused, see CRIMINAL LAW, 2, 3.
Evidence of other crimes, see CRIMINAL LAW, 6.

1. BURGLARY—SECOND DEGREE—ELEMENTS OF OFFENSE. Under Rem. & Bal. Code, § 2579, defining burglary in the second degree as an entry of a dwelling with intent to commit some crime, under circumstances not amounting to burglary in the first degree, it is not essential to burglary in the second degree that it was committed in the nighttime. *State v. Leroy*..... 405

BY-LAWS:

Of associations, see ASSOCIATIONS.

CANCELLATION OF INSTRUMENTS:

Rescission of contract, see CONTRACTS, 2; SALES, 1, 2.
Removal of clouds from title, see QUIETING TITLE.
Rescission of contract of sale of land, see VENDOR AND PURCHASER, 4, 5.

1. CANCELLATION OF INSTRUMENTS—DEED—FAILURE OF CONSIDERATION—BREACH OF CONTRACT—COLLATERAL. A deed made without fraud, while the grantor was under no disability or infirmity, in consideration of a collateral contract which was in no sense an integral part of the deed, is not to be cancelled for breach of the contract; since enforcement of the contract should be sought at law. *Murkowski v. Murkowski* 103

2. SAME—DEED — CONSIDERATION — COLLATERAL CONTRACT—MISTAKE. Where a deed of a half interest in a blacksmith shop passed between father and son in consideration of a collateral contract for the payment to the grantor of six dollars per week, and the minds of the parties did not meet, one understanding that the money was to be paid for life, and the other only while the grantor worked in the shop, the deed and whole transaction should be set aside. *Murkowski v. Murkowski*..... 103

CARRIERS:

Master's liability for injuries to servant, see MASTER AND SERVANT, 26, 45, 49.

1. CARRIERS—LIVE STOCK—LIMITED LIABILITY—CONTRACT—VALIDITY—IMPEACHMENT. If freely entered into, a limited liability contract for the shipment of live stock fixing a maximum valuation, on which the transportation rate is based, measures the rights of the shipper for injuries through negligence of the carrier, and the contract is not impeached, as a matter of law, by evidence to the effect that on transferring from one railway to another, the contract was signed hurriedly without reading it, or explanation; especially where the original contract for shipment was of the same character. *Pierson v. Northern Pacific R. Co*..... 450

2. SAME—LIMITED LIABILITY—CONSIDERATION—PRESUMPTION. Upon shipping stock under a limited liability contract, it will be presumed, in the absence of evidence to the contrary, that a fair consideration was given in the way of reduced rates. *Pierson v. Northern Pacific R. Co.* 450

3. SAME—LIABILITY—VIOLATION OF FEDERAL STATUTE. A limited liability contract for the shipment of stock prevails in the case of overconfinement of the stock in violation of a Federal statute, as in other cases, where the act was due to negligence. *Pierson v. Northern Pacific R. Co*..... 450

CARRIERS—CONTINUED.

4. SAME—ACTIONS—PRECEDENT NOTICE OF CLAIM—REASONABLENESS. A stipulation in a contract for the carriage of live stock providing that written notice of claim for damage shall be given before the stock is removed from the place of destination is unreasonable and inapplicable where the injuries to stock could not be ascertained with any degree of certainty within the time limited, nor where the animals died before their removal. *Pierson v. Northern Pacific R. Co.* 450

CERTAINTY:

Of contract of guaranty, see GUARANTY.

CERTIFICATE:

To statement of facts or bill of exceptions, see APPEAL AND ERROR, 9.

CERTIORARI:

1. CERTIORARI—WHEN LIES—CHANGE OF VENUE—REMEDY BY APPEAL. Certiorari lies to review an order for a change of venue, since the remedy by appeal is inadequate. *State ex rel. Schwabacher Brothers & Co. v. Superior Court*..... 681

CESSATION OF CONTROVERSY:

On appeal, see APPEAL AND ERROR, 2.

CHALLENGE:

Waiver of error in denying challenge to juror, see JURY, 6.
To panel, see JURY, 5.

CHARGE:

To jury in criminal prosecutions, see CRIMINAL LAW, 14, 15.
To jury in civil actions, see TRIAL, 4-8.

CHARTER:

Of municipal corporations, see MUNICIPAL CORPORATIONS, 1, 2.

CHECKS:

See BILLS AND NOTES.

CHILD:

See INFANTS.
Children of Indian woman as citizens, see CITIZENS.

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

Privileges and immunities, see CONSTITUTIONAL LAW, 2.

1. CITIZENS—CHILDREN OF CITIZENS—INDIANS. The civil status of one born of an Indian mother, by a white father who is a citizen of the United States, follows that of the father. *State v. Nicolls*.. 142

CIVIL RIGHTS:

Constitutional guaranty of civil rights, see CONSTITUTIONAL LAW, 2.
Deprivation of life, liberty, or property without due process of law, see CONSTITUTIONAL LAW, 3.

CLAIMS:

Notice of claim for damages as condition precedent to removal of injured live stock, see CARRIERS, 4.
Purchase of claims against insolvent estate by wife of trustee, see EXECUTORS AND ADMINISTRATORS.
For injuries by servant before suit, see MASTER AND SERVANT, 31.
Against municipal corporation for injury in streets, notice of, see MUNICIPAL CORPORATIONS, 25.
Against property in hands of receiver, see RECEIVERS.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW, 2.

CLOUD ON TITLE:

See QUIETING TITLE.

CLUBS:

See ASSOCIATIONS.

COLLISION:

Between street cars or with vehicles, see STREET RAILROADS, 18.

COLOR OF TITLE:

Necessity to sustain adverse possession, see ADVERSE POSSESSION.

COMMENT:

On evidence as harmless error, see APPEAL AND ERROR, 27.
On evidence at trial, see TRIAL, 2.

COMMISSIONERS:

Failure of court commissioner to take oath as harmless error, see APPEAL AND ERROR, 25.
To locate boundaries, see BOUNDARIES, 2, 3.
Power of commissioner of public works to award bridge contract, see MUNICIPAL CORPORATIONS, 5.

COMMISSIONS:

Of broker, see BROKERS, 3, 4.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY PROPERTY:

In general, see HUSBAND AND WIFE.

COMPENSATION:

Of broker, see BROKERS, 3, 4.
Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.
For property taken for public use, see EMINENT DOMAIN.
Of agent, see PRINCIPAL AND AGENT, 1.
Of trustee, see TRUSTS, 2.

COMPETENCY:

Of experts as witnesses, see EVIDENCE, 8, 9.
Of evidence in civil actions, see EVIDENCE, 1, 3, 4.
Of juror, see JURY, 6.
Of fellow employees, see MASTER AND SERVANT, 43.
Of witnesses in general, see WITNESSES, 1.

CONCLUSION:

Of witness, see EVIDENCE, 8, 9.

CONCLUSIVENESS:

Of judgment, see JUDGMENT.

CONDEMNATION:

Taking property for public use, see EMINENT DOMAIN.

CONDITIONAL SALES:

Rights of vendor of property held by insolvent under conditional sale, see RECEIVERS.
Sale of property held under as conversion, see TROVER AND CONVERSION.

CONDITIONS:

Precedent notice of claim for damages before removal of live stock, see CARRIERS, 4.

CONFESSION:

Admissibility in evidence, see CRIMINAL LAW, 8.

CONSIDERATION:

Failure of as ground for cancellation, see CANCELLATION OF INSTRUMENTS.
Presumption as to for limited liability contract, see CARRIERS, 2.
Of guaranty, see GUARANTY.

CONSPIRACY:

False pretenses through conspiracy, see FALSE PRETENSES, 1.
Complaint in action for conspiracy to defraud, see FRAUD, 2.

CONSTITUTIONAL LAW:

Forfeiture of corporate franchise for nonpayment of license fee as violation of contract rights, see CORPORATIONS, 9.
Dissolution of corporation and forfeiture of franchise for failure to pay license fee as encroachment on judiciary, see CORPORATIONS, 8.
Prohibiting sale of liquor to Indian citizen of mixed blood, see INDIANS.
Validity of local option law, see INTOXICATING LIQUORS, 1.
Right to trial by jury, see JURY, 1, 2.

1. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACT—STREET RAILWAY FRANCHISE. An ordinance providing a reasonable frequency of street car service, does not impair the obligation of a franchise reserving the right to require the cars to make sufficient trips, or of a franchise prescribing a minimum service of two round trips a day. *Tacoma v. Boutelle*..... 434

2. CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—INTOXICATING LIQUORS—PROHIBITION. The right to sell or drink liquor is not a constitutional right and may be granted to one class of citizens and denied to others. *State v. Nicolls*..... 142

3. CONSTITUTIONAL LAW—DUE PROCESS—WATERWAY DISTRICT—STATUTES—VALIDITY. Rem. & Bal. Code, § 8166 *et seq.*, providing for the creation of commercial waterway districts, at the expense of the property benefited, is void in that it directs an assessment to be made on the lands benefited, but no person or board is authorized to make the assessment, and no provision is made for an assessment roll or equalization of the same, and the owners are given no notice or opportunity to be heard; and the provisions therein for a jury to assess the damages for land taken cannot be construed as authorizing the jury to assess the benefits. *State ex rel. Bussell v. Abraham* 601

CONSTRUCTION:

Of contracts, see CONTRACTS, 1.
As to boundaries of plat, see DEDICATION.
Of eminent domain statutes, see EMINENT DOMAIN, 1.
Of statute making offense to allow minors in pool rooms where liquor is sold, see INFANTS.
Of fire insurance policy, see INSURANCE, 1.
Of local option law, see INTOXICATING LIQUORS, 2.
Of lease, see LANDLORD AND TENANT, 1.
Of contract of indemnity, see PRINCIPAL AND SURETY, 2.
Of contract for sale of uplands, see PUBLIC LANDS, 2.
Of street car franchise, see STREET RAILROADS, 2-4.

CONTINUANCE:

Necessity for asking on account of newly discovered evidence as basis for new trial, see NEW TRIAL, 8.

1. CONTINUANCE—DILIGENCE. A continuance is properly denied in a criminal case where the accused took no steps to secure a subpoena for witnesses until more than a month after the case was set for trial, and the only diligence shown to secure witnesses living at a distance was the writing of letters a few days before the trial, with no excuse for the delay. *State v. Leroy*..... 405

CONTRACTS:

Bills and notes, see BILLS AND NOTES.
Between brokers to divide commissions, see BROKERS, 4.
By brokers for sale of land, see BROKERS.
Breach as ground for cancellation of deed, see CANCELLATION OF INSTRUMENTS, 1.
Limiting liability of carrier for negligence, see CARRIERS.
Impairing obligation, see CONSTITUTIONAL LAW, 1.
Laws violating contract rights of creditors, see CORPORATIONS, 9.
Liability of corporation for unauthorized execution of promissory notes, see CORPORATIONS, 5.
Covenants in deeds, see COVENANTS.
Damages for delay in completing building, see DAMAGES, 2.
Admission of parol or extrinsic evidence, see EVIDENCE, 6, 7.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Of guaranty, see GUARANTY.
Of insurance in general, see INSURANCE.
Conclusiveness of judgment in action on, see JUDGMENT.
Modification of building contract, see MECHANICS' LIENS, 2.
Municipal contracts, see MUNICIPAL CORPORATIONS, 5.
Discharge of surety on building contract by change in obligation of principal, see PRINCIPAL AND SURETY, 2.
Construction of contract of indemnity, see PRINCIPAL AND SURETY, 1.
Of vendor of uplands as assigning preference right to purchase tide lands, see PUBLIC LANDS.
Sales of personalty, see SALES.
Specific performance, see SPECIFIC PERFORMANCE.
Sale of land, see VENDOR AND PURCHASER.

1. CONTRACTS—SUPPORT—CONSTRUCTION. Under a contract for life support at defendant's home, providing that plaintiff shall not refuse to reside with defendant except for defendant's neglect or failure to suitably provide for plaintiff, in which event defendant was to pay $15 per month, defendant is not liable for the monthly payments where plaintiff unjustifiably refused to reside with defendant. *Gladden v. Jacobowski*..... 242

2. CONTRACTS — RESCISSION — DEFAULTS IN PAYMENT — TIME OF ESSENCE. Where a contract, in which plaintiff agreed to pay $175 per month for the display of an advertising drop curtain in a

CONTRACTS—CONTINUED.

theater, does not make time of the essence, time becomes of the essence of the contract on defendant's demand for payment and threats to remove the curtain; and where plaintiff remains in default, the defendant may rescind the contract and declare a forfeiture. *Beltinck v. Tacoma Theater Co*..... 132

3. SAME—WAIVER OF RESCISSION—ACCEPTANCE OF PAYMENTS. Acceptance after maturity of payments of monthly rent for the display of an advertising drop curtain in a theater, the rent being due in advance, does not waive the right to rescind the contract for defaults in payment, where the payments made were received after protest and frequent demands and repeated threats to remove the curtain. *Beltinck v. Tacoma Theater Co*..... 132

4. CONTRACTS — BOARD AND SERVICES — VALUE — QUESTION FOR JURY. The reasonable value of services and board furnished at a boarding school is for the jury, where there was evidence supporting the defense that the food was insufficient in quantity and some of it unfit to be eaten; and it is error for the court to direct judgment for the plaintiff. *Lyon v. Sparks*..... 348

5. CONTRACTS—BUILDING CONTRACT — PERFORMANCE. Failure to put saddle boards on the ridge pole of a house, when the total cost of doing so would not exceed one dollar, and which were not in the specifications and are not put on all houses, does not amount to nonperformance of a building contract preventing a recovery of the contract price. *McAdam v. Russell*..... 176

CONTRIBUTORY NEGLIGENCE:

Harmless error in instructions on, see APPEAL AND ERROR, 44.
Of persons injured by blast, see EXPLOSIVES, 1.
Of servant, see MASTER AND SERVANT, 20, 24-27, 29, 30, 40, 44, 52-55.
Of pedestrian injured on city street, see MUNICIPAL CORPORATIONS, 22, 23.
Of person injured in collision with street car, see STREET RAILROADS, 18.

CONVEYANCES:

In general, see DEEDS.
By husband and wife, see HUSBAND AND WIFE, 1.
As security for debt, see MORTGAGES.

CORPORATIONS:

Municipalities, see MUNICIPAL CORPORATIONS.
Condition precedent to capacity to sue, see PARTIES.
Merger of street railway companies and duty to issue transfers, see STREET RAILROADS, 11.

CORPORATIONS—CONTINUED.

1. CORPORATIONS — STOCKHOLDERS — DEALINGS WITH CORPORATION—PROFITS MADE. Where the continued existence of a corporation requires the purchase of a competing business, a syndicate consisting of officers and a majority of the stockholders of the corporation may, after full disclosure of all the facts, acquire the property and resell it to the corporation at a profit to themselves, and are not within the rule preventing officers of a corporation from dealing in property of the corporation. *Baker v. Seattle-Tacoma Power Co.* 578

2. SAME—ACTION BY STOCKHOLDER—WAIVER OF OBJECTIONS—ESTOPPEL. A minority stockholder is estopped from maintaining a suit to compel a syndicate, consisting of officers and a majority of the stockholders, to pay to the corporation a profit realized by them in the purchase of a competing business, to save the life of the corporation, and a resale by them to the corporation at a profit, where such minority holder, after objecting to the sale, made a written waiver of his objections and ratified the sale, in order that certain bonds of the corporation could be sold. *Baker v. Seattle-Tacoma Power Co.* 578

3. SAME—MEETINGS—VOTING BY PROXY. A stockholder's proxy clothes the proxy holder with full power to represent such portions of the stock, and binds the absent owner, in the absence of fraud. *Baker v. Seattle-Tacoma Power Co.* 578

4. CORPORATIONS—STOCKHOLDERS—ACTIONS BETWEEN—ALLOWANCE OF ATTORNEY'S FEES. Where, in an action by a stockholder to recover from officers and other stockholders a profit realized by them in dealings between themselves and the corporation, payments are made to the corporation by stockholders who do not care to contest the matter, it is proper to allow the plaintiff an attorney's fee, although the payments were voluntary. *Baker v. Seattle-Tacoma Power Co.* 578

5. CORPORATIONS—REPRESENTATION BY OFFICERS—CONTRACTS—NOTES—AUTHORITY TO EXECUTE—RATIFICATION. A corporation is liable upon its promissory notes executed without express authority of its trustees, where they were signed by the secretary (one of the trustees) with the knowledge and consent of the president, the only other trustee, this was the habitual method of transacting its business, and the notes were used to raise funds to finance the corporation and purchase machinery and equipment. *National Bank of Commerce v. Puget Sound Biscuit Co.* 192

6. CORPORATIONS — ACTIONS — PARTIES — CAPACITY TO SUE—LICENSE FEE—WAIVER OF OBJECTION. The objection that a corporation could not maintain an action because it was not alleged or proved that it had paid its annual license fee under Rem. & Bal. Code, § 3715,

CORPORATIONS—CONTINUED.

is waived if not taken by answer or demurrer; or at least by specific objection to testimony on that ground, where the action was completely at issue before the passage of the act. *Thompson-Spencer Co. v. Thompson*..... 547

7. CORPORATIONS—DISSOLUTION—ACTIONS—ABATEMENT AND REVIVAL. An action ,whether at law or in equity, against a corporation abates upon the loss, *pendente lite*, of its franchise by having its name stricken from the records of the secretary of state for failure to pay its annual license fee, pursuant to Rem. & Bal. Code, § 3715, and failure to apply for a reinstatement pursuant to Id., § 3715a, where its receiver or trustees are not substituted as parties. *Hawley v. Bonanza Queen Mining Co*..... 90

8. CORPORATIONS—DISSOLUTION—LICENSE FEES—CONSTITUTIONAL LAW—LEGISLATIVE POWER—ENCROACHMENT ON JUDICIARY. Rem. & Bal. Code, § 3715, providing that the names of corporations shall be stricken from the records of the secretary of state, and the corporation dissolved for failure to pay the annual license fees unless reinstated, under § 3715a, is not unconstitutional on the theory that a forfeiture of corporate franchises cannot be decreed except by a court of competent jurisdiction. *Hawley v. Bonanza Queen Mining Co.* 90

9. SAME—CONTRACT RIGHTS—PARTIES—CREDITORS. Rem. & Bal. Code, §§ 3715 and 3715a, providing for the forfeiture of corporate franchises for the nonpayment of annual license fees violates no contract rights of creditors of the corporation; since they are not parties to the contract between the state and the corporation or its stockholders, and still have a remedy against its assets. *Hawley v. Bonanza Queen Mining Co*..... 90

COSTS:

In divorce, see DIVORCE, 2.
In assessing property benefited, see MUNICIPAL CORPORATIONS, 17, 19.

1. COSTS—WITNESS FEES—MILEAGE. Mileage for witnesses may be first claimed in the cost bill, although the witnesses did not claim the same in reporting their daily attendance to the court. *Hall v. Northwest Lumber Co*..... 351

2. COSTS—DISBURSEMENTS—INTERPRETER'S FEES. The reasonable fees of an interpreter are properly allowed as disbursements, when necessarily incurred. *Hall v. Northwest Lumber Co*..... 351

3. COSTS—ON APPEAL—MODIFICATION OF JUDGMENT. A reduction of $100 from a $400 judgment is such a substantial reduction as to carry costs on appeal. *Jones v. Kehoe*..... 422

COURTS:

Review of decisions, see APPEAL AND ERROR.
Decision on appeal as law of the case, see APPEAL AND ERROR, 46-48.
Failure of commissioner to take oath as harmless error, see APPEAL AND ERROR, 25.
Statutes dissolving corporation for nonpayment of annual license as encroachment on judiciary, see CORPORATIONS, 8.
Condemnation proceedings, see EMINENT DOMAIN.
Estoppel by judicial proceedings, see ESTOPPEL, 1.
Jurisdiction in injunction proceedings, see INJUNCTION, 1.
Conclusiveness of judgments, see JUDGMENT.
Right to trial by jury, see JURY, 1, 2.
Review of assessment proceedings, see MUNICIPAL CORPORATIONS, 19.
Review of acts or decisions respecting regulation or operation of street car service, see STREET RAILROADS, 6-10.

COVENANTS:

1. COVENANTS—QUIET ENJOYMENT—DAMAGES—MEASURE. Where lots in a plat included shore lands which were afterwards included in the state plat of the shore lands, the measure of damages for breach of covenant of quiet enjoyment in the deed of the lots is the proportion of the purchase price paid to the state which the area overlapped by the state plat bore to the total area of the lots. *Cameron v. Burke* 203

CRIMINAL LAW:

See BURGLARY; FALSE PRETENSES; HOMICIDE; LARCENY; LEWDNESS; RAPE.
Continuance of criminal case, see CONTINUANCE.
Allegations in indictment, see INDICTMENT AND INFORMATION.
Conviction of offense included in that charged, see INDICTMENT AND INFORMATION, 2.
Allowing minors in pool room where liquor is sold, see INFANTS.
Right to trial by jury, see JURY, 2.
Newly discovered evidence as ground for new trial, see NEW TRIAL, 7.
Trial of civil actions, see TRIAL.

1. CRIMINAL LAW—APPEAL FROM JUSTICE COURT—AMENDMENT OF COMPLAINT. Upon appeal from justice court in a criminal case, the superior court cannot allow an amended complaint to be filed, over objection by the accused. *State v. Hamshaw* 390

2. CRIMINAL LAW—EVIDENCE—IDENTITY. In a prosecution for burglary, in which a witness testified that the accused was wearing the witness' shoes, evidence that the witness had tried on and could wear the shoes identified as shoes left by the accused is admissible. *State v. Leroy* 405

CRIMINAL LAW—CONTINUED.

3. SAME. In a prosecution for burglary, evidence that an unidentified man was met at a certain place, and concealed himself, is admissible, where it appears from other evidence that the accused went in that direction, and where the incident, with other evidence, was a circumstance tending to connect him with the crime charged. *State v. Leroy*..... 405

4. CRIMINAL LAW—EVIDENCE—ESCAPE. Evidence of the accused's escape and recapture by the sheriff is admissible as a circumstance tending to show guilt. *State v. Leroy*..... 405

5. CRIMINAL LAW—EVIDENCE—SIMILAR CRIMES—RES GESTAE. In a prosecution for assault with intent to commit sodomy, evidence of the same act upon another boy immediately after the first, is admissible as part of the *res gestae*. *State v. McDowell*..... 398

6. CRIMINAL LAW—EVIDENCE—OTHER CRIMES. Upon a prosecution of burglary, evidence of another burglary in the vicinity about the same time, and that articles then stolen, with burglar's tools, were found on the person of the accused, who was arrested shortly after taking a stage ride from that locality, is admissible to show that accused was in the vicinity and had opportunity to commit the crime. *State v. Leroy*..... 405

7. CRIMINAL LAW—EVIDENCE OF OTHER CRIMES—FALSE PRETENSES. In a prosecution for obtaining money under false pretenses, through a conspiracy with a swindling clairvoyant who predicted and advised the investments, evidence of other similar offenses, committed by the same conspirators in the same way upon other dupes, is admissible to show that the acts were done as part of a general scheme of conspiracy to defraud, the unusual and extraordinary means employed making an exception to the general rule that evidence of other crimes is not admissible. *State v. Craddick*..... 425

8. CRIMINAL LAW—EVIDENCE—CONFESSIONS—ADMISSIBILITY—DURESS. A confession is inadmissible as one obtained by duress, where it appears that the prosecuting attorney threatened the accused with a series of prosecutions which would culminate in cumulative sentences, unless he confessed, he was subjected to solitary confinement in a dark cell, and testified that he was subjected to severe cruelties and threatened with appalling punishments if he did not confess; and it appears that the jailors threatened many other prisoners if they did not confess, and confined them in the dark cell for refusal to do so. *State v. Miller*..... 135

9. CRIMINAL LAW—TRIAL—INDORSEMENT OF NEW WITNESSES—APPEAL—HARMLESS ERROR. It is not prejudicial error to permit at the trial the endorsement of new witnesses for the state, where the defendant asked either a continuance or a subpoena for four witnesses, and thereupon the subpoena was issued and all the witnesses appeared in time to testify. *State v. Gray*..... 549

CRIMINAL LAW—CONTINUED.

10. CRIMINAL LAW—TRIAL—REOPENING CASE—DISCRETION. It is not an abuse of discretion to refuse the accused's request to reopen the case, where counsel for accused advisedly refused to offer any evidence and rested, and the witnesses for the state were excused and an adjournment taken until the next morning. *State v. Pilegge* 264

11. CRIMINAL LAW—TRIAL—MISCONDUCT OF JURY—VIEW. There is such misconduct on the part of the jury as to require a reversal of a conviction, where it appears that the jury, on being sent to view a cell that had been occupied by the accused, inspected, on invitation, the office of a police captain who was an important factor in the prosecution, and it was alleged that such officer had assaulted the accused, and the captain conversed with the jurors on the subject of the assault, calling attention to the fact that the window gave full view from the street, and the jury was drawn into a social conversation with him. *State v. Miller*..... 125

12. CRIMINAL LAW—APPEAL—RECORD. Comment on the facts pending a motion to quash the jury panel cannot be assigned as error, when the jury had not been called to the box and the record does not show that any juror was present. *State v. Leroy*..... 405

13. CRIMINAL LAW—APPEAL—PARTY ENTITLED TO ALLEGE ERROR. Upon appeal by accused from a conviction, the state cannot urge error in that his sentence was under the wrong statute, and too light. *State v. McDowell* 398

14. CRIMINAL LAW — SELF-DEFENSE — INSTRUCTIONS—APPEAL—HARMLESS ERROR. In a charge on the subject of self-defense, the inapt use of the expression "justified by necessity," is not reversible error where the instruction, considered as a whole in the light of other instructions, fairly states the law, although if considered alone it might be prejudicial. *State v. Letica*..... 629

15. CRIMINAL LAW — APPEAL — INSTRUCTIONS — HARMLESS ERROR. A needlessly long instruction will not be held prejudicial, as a matter of law, as singling out the evidence of the accused, when the appellate court is unaided by the evidence and the instruction appears correct in the abstract. *State v. Letica*..... 629

CROSS-EXAMINATION:

See WITNESSES, 3.

CUSTOM:

Evidence of warning of blast, see EXPLOSIVES, 2.
Selection of appliances for work, see MASTER AND SERVANT, 4.
Evidence of usual construction of trestles, see MASTER AND SERVANT, 38.

DAMAGES:

Assignability of action for, see ASSIGNMENTS.
Breach of covenant, see COVENANTS.
Condemnation of property taken for public use, see EMINENT DOMAIN.
Loss by fire carelessly set out on right of way, see FIRES.
For fraud, see FRAUD, 3.
On injunction bonds, see INJUNCTION, 2.
Right of servant to recover for blacklisting, see MASTER AND SERVANT, 1.
Injuries from public improvements, see MUNICIPAL CORPORATIONS, 9, 10.
For fraud of agent in sale of land, see PRINCIPAL AND AGENT, 2.
For trespass, see TRESPASS.

1. DAMAGES—PERSONAL INJURIES—EARNING CAPACITY. The measure of damages for impaired earning capacity is the difference before and after the accident, and also the use made of it. *Cook v. Danaher Lumber Co.* 118

2. DAMAGES—CONTRACTS—BREACH—DELAY IN COMPLETING BUILDING. Damages for a month's delay in completing a flat, built for rent, are properly disallowed, where there was no proof of applications for rent during the time or other competent evidence of damage, and interest on a large balance due was only computed from one month after the completion of the building. *Jones v. Nelson* 167

3. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,934, reduced to $3,000 by the trial court, is not excessive, where the plaintiff sustained a serious injury to his arm whereby he suffered much pain, spent $150 for doctor's fees, and was unable to follow his vocation for about fifteen months, and his earning power was three dollars a day. *Dukette v. Northwestern Woodenware Co.* 95

4. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,500 will not be disturbed as excessive, where there was a conflict in medical evidence, and the testimony of certain witnesses, if believed, would warrant the verdict. *Barnum v. Seattle, Renton & Southern R. Co.* 157

5. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $6,500 for personal injuries, reduced by the trial court to $4,000, will not be set aside as excessive, where the injury was substantial, and the trial judge was better able to arrive at a just conclusion than the appellate court. *Smith v. Seattle Electric Co.* 175

6. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $20,000 for personal injuries sustained by a coal miner, thirty-seven years of age, is not excessive, where he had a wife and five children to support, and according to the expert witnesses he was left a

DAMAGES—CONTINUED.

broken and disjointed wreck, with no hope of recovery and only suffering and embarrassments to look forward to. *Starck v. Washington Union Coal Co.*..... 213

7. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict of $16,500, reduced to $14,000, for the death of a coal miner, thirty-five years of age, who was industrious and thrifty, is not excessive. *Cox v. Wilkeson Coal & Coke Co.*..... 343

8. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for ten thousand dollars for personal injuries through the breaking of a leg is not excessive, where the broken bone did not unite after two operations, the plaintiff was only twenty-three years of age, and cannot work in a standing position. *Hall v. Northwest Lumber Co.*..... 351

9. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $16,333 for electric burns received by a boy eighteen years of age, is not excessive, where he was terribly burned, skin grafting was resorted to, his face was disfigured and deformed, the flesh from one of his legs sloughed out, and his sight was impaired and cataracts induced, which may result in total blindness. *Haggard v. Seattle* 499

10. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for seven thousand dollars for injuries to a coal miner through an explosion is not excessive, where he was badly scarred and disfigured, his suffering was great, one of his hands permanently injured, his earning capacity was $100 per month, and will in the future be slight at manual labor, and he is ill fitted for anything else. *Mrozevich v. Western Steel Corporation*..... 668

11. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $8,000 for injuries to a coal miner caused by an explosion, reduced by the trial judge to $6,000, will not be held excessive on appeal, where in addition to great pain and suffering, loss of time, and temporary disability, the plaintiff was marred and disfigured for life. *Nelson v. Western Steel Corporation*..... 672

12. DAMAGES—PERSONAL INJURIES—INADEQUATE DAMAGES. A verdict for $100 damages from an explosion of dynamite should not be set aside as inadequate, where the only permanent injury sustained was the perforation of the left ear drum producing defective hearing on that side, the plaintiff did not consult a doctor for nine months, and then took no treatment when he might have been cured, and there is nothing to indicate prejudice. *Bluher v. Earles*..... 84

DANGEROUS MACHINERY AND APPLIANCES:

See MASTER AND SERVANT.

DEATH:

Admissibility of declarations of persons since deceased, see EVIDENCE, 3, 4.

Alleging death in information, see HOMICIDE, 1.

Of coal miner from gas caused by firing blast, see MASTER AND SERVANT, 14, 29, 41.

1. DEATH — INSURANCE — ACCIDENTAL DEATH—INJURIES—EVIDENCE—SUFFICIENCY. In an action on an accident insurance policy precluding recovery for death by drowning, there is no sufficient proof that the insured received a personal bodily injury through external, violent, or accidental causes other than drowning, and that her death resulted from injury, where she went down with the vessel and was seen no more, and it was merely shown that when the vessel sank head first into the sea, other passengers near the insured were thrown violently against the deck and received severe bodily injuries, one rescued passenger having died from such injuries. *Lewis v. Continental Casualty Co*..... 154

DEBT:

Validity of oral promise to another for debt of another, see FRAUDS, STATUTE OF, 1.

DECEDENTS:

See EXECUTORS AND ADMINISTRATORS.

Admissibility of declarations of persons since deceased, see EVIDENCE, 3. 4.

Testimony as to transactions with persons since deceased, see WITNESSES, 1.

DECISION:

On appeal, see APPEAL AND ERROR, 46-49.

Former decisions as controlling, see JUDGMENT.

DECLARATIONS:

As evidence in civil actions, see EVIDENCE, 3-5.

DEDICATION:

1. DEDICATION—INTENT—PLATS—BOUNDARIES. A plat bordering on water is not to be construed as intended to cover only uplands, where it is evident that the plattors assumed to own and platted part of the shore lands. *Cameron v. Burke*..... 208

DEEDS:

Cancellation of, see CANCELLATION OF INSTRUMENTS.

Measure of damages for breach of covenant in, see COVENANTS.

Waiver of damages in right-of-way deed as affecting recovery for loss by fire, see FIRES.

Absolute deed as mortgage, see MORTGAGES.

DEEDS—CONTINUED.

Delivery of escrow deed as assignment of preference right to purchase tide lands, see PUBLIC LANDS, 3.

Reformation, see REFORMATION OF INSTRUMENTS.

As notice to subsequent purchasers, see VENDOR AND PURCHASER, 7.

1. DEEDS—DELIVERY—EVIDENCE—SUFFICIENCY. The presumption that a deed, properly executed and in the possession of the grantees, was duly delivered can only be overcome by clear and convincing proof; and such proof is not made where it appears that the grantors voluntarily surrendered the granted premises to the grantees, entered upon premises taken in exchange, and consumed personal property received in exchange, and paid an agent's commission long after the alleged fraud in securing possession of the deed from one of the grantors while intoxicated. *Anderson v. Woolley*..... 236

2. DEEDS—DELIVERY—ACCEPTANCE—RATIFICATION. The procuring of a deed from a railroad company by a banker, who looked after the interests of the grantee and made final payment, is a sufficient delivery to the grantee, with acceptance and ratification by him, where he thereafter tried to obtain a statement from the banker and settle with him. *Petticrew v. Greenshields*..... 614

DEFAULT:

Rescission of contract for defaults in payment, see CONTRACTS, 2.

Validity of oral contract to answer for default of another, see FRAUDS, STATUTE OF, 1.

DEFICIENCY:

In acreage upon sale of land, see VENDOR AND PURCHASER, 3.

DEFINITENESS:

As affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 1.

DEGREES:

Of burglary and elements of offense, see BURGLARY.

Of assault and conviction of lesser offense included in charge, see INDICTMENT AND INFORMATION, 2.

DELAY:

In securing witnesses as ground for denying continuance, see CONTINUANCE.

Laches, see EQUITY.

DELIVERY:

Of deeds, see DEEDS.

Of escrow deed as assignment of vendor's preference right to purchase tide lands, see PUBLIC LANDS, 3.

DEMURRER:

To pleading, see PLEADING, 2, 3.

DESCENT AND DISTRIBUTION:

Administration of estates of decedents, see EXECUTORS AND ADMINISTRATORS.

DESCRIPTION:

In ordinance of lots to be assessed for improvement, see MUNICIPAL CORPORATIONS, 8.

Reformation of instruments as to matters of description, see REFORMATION OF INSTRUMENTS.

DILIGENCE:

Affecting right to continuance, see CONTINUANCE.

Affecting right to new trial, see NEW TRIAL, 8.

DISBURSEMENTS:

See COSTS, 2.

DISCHARGE:

Tender of payment by contractors as discharging owner from liability, see MECHANICS' LIENS, 5.

From liability as surety, see PRINCIPAL AND SURETY, 2.

DISCRETION OF COURT:

Appointment of commissioners to establish boundary, see BOUNDARIES, 2.

Reopening case for further evidence, see CRIMINAL LAW, 10.

Allowance of costs and attorney's fees to wife in action for divorce, see DIVORCE, 2.

New trial, see NEW TRIAL, 6, 8.

DISCRIMINATION:

Special privileges or immunities and class legislation, see CONSTITUTIONAL LAW, 2.

DISMISSAL AND NONSUIT:

Dismissal of appeal on ground of cessation of controversy, see APPEAL AND ERROR, 2.

Dismissal of appeal for failure to serve notice, see APPEAL AND ERROR, 7.

Judgment of dismissal as *res adjudicata*, see JUDGMENT, 2, 3.

Evidence considered on motion for nonsuit, see NEGLIGENCE, 2.

DISSOLUTION:

Of corporation, see CORPORATIONS, 7.

Of community, see HUSBAND AND WIFE, 3.

DIVORCE:

Findings as estoppel to claim rights after divorce, see ESTOPPEL, 1.
Effect on community property not disposed of by divorce, see HUSBAND AND WIFE, 3.

1. DIVORCE—ALIMONY. It is error to allow $750 as alimony out of the husband's estate valued at $10,000, upon granting the husband's prayer for a divorce, where the wife had estate of the value of $2,500, and there was no community property for division, and she had inveigled the husband into the marriage relation for the purpose of gaining a share of his property, had brought unfounded charges of cruelty in order to obtain a divorce, and was guilty of cruelty and indignities rendering the husband's life burdensome. *Van Gelder v. Van Gelder* 146

2. DIVORCE—ATTORNEY'S FEES—COSTS. Allowance of costs and attorney's fees to a wife in an action for divorce is within the discretion of the trial court, although divorce be granted to the husband on his cross-complaint, and will not be disturbed on appeal, where there is no suggestion of abuse of discretion. *Van Gelder v. Van Gelder* 146

DOCTORS:

See PHYSICIANS AND SURGEONS.

DRAFTS:

See BILLS AND NOTES, 1.

DRAWING:

Of jury and time for service, see JURY, 5.

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW, 3.

DUPLICITY:

In information, see INDICTMENT AND INFORMATION, 1.
Of ordinance for condemnation for public improvement, see MUNICIPAL CORPORATIONS, 7.

DURESS:

Confessions produced by duress, see CRIMINAL LAW, 8.

EARNINGS:

Measure of damages for impairment of earning capacity, see DAMAGES, 1.
Living with and accepting earnings of prostitute, see LEWDNESS.

ELECTION:

By petitioner to abandon proceedings or appropriate property, see EMINENT DOMAIN, 3.

ELECTIONS:

Enjoining canvassing of returns of illegal election to annex territory, see INJUNCTION, 1.

Election to determine question of annexation of territory to city, see MUNICIPAL CORPORATIONS, 3, 4.

EMINENT DOMAIN:

Assessment of benefits to land by creation of commercial waterway district, see CONSTITUTIONAL LAW, 3.

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 6-19.

1. EMINENT DOMAIN—STATUTES—CONSTRUCTION. The statutes of eminent domain are to be strictly construed. *North Coast R. Co. v. Aumiller* 271

2. EMINENT DOMAIN—PRIVATE PROPERTY — TIDE LANDS — DAMAGE — NAVIGABLE WATERS—BRIDGES. Uplands and the abutting tide lands to deep water, purchased from the state, there being no intervening harbor area, is private property which cannot be taken or damaged without compensation by the operation of a railroad draw bridge across navigable water authorized by Federal and state authority; and the obstruction of a wharf on such premises by the operation of the draw is not damage *absque injuria*, and may be enjoined. *Northern Pac. R. Co. v. Slade Lumber Co*..... 195

3. SAME—JUDGMENT ON AWARD — TIME FOR ENTRY — ABANDONMENT. After an award of damages in eminent domain, judgment need not be entered immediately, but the petitioner has a reasonable time within which to elect whether to abandon the proceedings or appropriate the property. *North Coast R. Co. v. Aumiller*..... 271

4. SAME—COMPENSATION—AWARD—INTEREST. Under Const., art. 1, § 16, requiring full compensation for private property condemned, the award of damages in eminent domain proceedings draws interest from the date of the rendition of the verdict to the time of entry of the judgment, where the owners, remaining in possession of the premises, received no rents or profits and were unable to rent the property because of the award. *North Coast R. Co. v. Aumiller* 271

EMPLOYEES:

See MASTER AND SERVANT.

ENACTMENT:

Of city ordinances, see MUNICIPAL CORPORATIONS, 1, 2.

ENTRY:

Of judgment on award in condemnation proceedings, see EMINENT DOMAIN, 3.

EQUITY:

See INJUNCTION; SPECIFIC PERFORMANCE; TRUSTS.
Equitable action of account, see ACCOUNT.
Review of findings on appeal in equity, see APPEAL AND ERROR, 23, 24.
Suits for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.
Suit to quiet title, see QUIETING TITLE.

1. EQUITY — LACHES — QUIETING TITLE — LIMITATION OF ACTIONS. Laches will not prevent the quieting of title to land, if suit is brought within the period of the statute of limitations, if the equities involved do not call for the exercise of the discretion of a court of equity. *Petticrew v. Greenshields*..... 614

ERROR OF LAW:

As ground for new trial, see NEW TRIAL, 2.

ESCAPE:

Evidence of accused's escape, see CRIMINAL LAW, 4.

ESCROWS:

Delivery of deed as assignment of vendor's preference right to purchase tide lands, see PUBLIC LANDS, 3.

ESTABLISHMENT:

Of boundaries, see BOUNDARIES.
Of trusts, see TRUSTS, 1.

ESTATES:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

Right to raise question for first time on appeal, see APPEAL AND ERROR, 3-6.
Of stockholders to maintain suit on behalf of corporation, see CORPORATIONS, 2.
To object to validity of administrator's sale, see EXECUTORS AND ADMINISTRATORS.
By judgment, see JUDGMENT.
To rescind contract of sale, see SALES, 1.

1. ESTOPPEL—JUDICIAL PROCEEDINGS — HUSBAND AND WIFE — RIGHTS AFTER DIVORCE. Findings in a divorce case that there was no community property would not estop the wife from claiming certain property if she had in fact claimed it in good faith in the divorce case. *Barkley v. American Savings Bank & Trust Co*..... 415

2. ESTOPPEL—ADMISSIONS. A broker having stated his expense in connection with a sale to be $200, cannot claim $300 therefor. *Jones v. Kehoe*..... 422

EVIDENCE:

Review of ruling as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 3.
Review of rulings as dependent on presentation by record, see APPEAL AND ERROR, 8.
Necessity for incorporating evidence in bill of exceptions, see APPEAL AND ERROR, 9.
Review of ruling as dependent on prejudicial nature of error, see APPEAL AND ERROR, 32-38.
Comment on as harmless error, see APPEAL AND ERROR, 27.
To establish boundaries, see BOUNDARIES, 1.
In criminal prosecutions, see CRIMINAL LAW, 2-8.
Other offenses, see CRIMINAL LAW, 5-7.
Evidence of bodily injury causing accidental death, see DEATH.
Delivery of deed, see DEEDS.
Customary warnings in firing blasts, see EXPLOSIVES, 2.
In action for obtaining money by false pretenses, see FALSE PRETENSES.
In action for fraud, see FRAUD, 4, 5.
In prosecution for homicide, see HOMICIDE, 2.
On insurance policies, see INSURANCE, 5, 6.
To sustain conviction for horse stealing, see LARCENY.
To support conviction for living with prostitute, see LEWDNESS.
For injuries to servant in general, see MASTER AND SERVANT.
Authority of vice principals, see MASTER AND SERVANT, 2.
Custom of employing miner to work in dangerous place without instructions, see MASTER AND SERVANT, 12.
Competency or incompetency of fellow servant, see MASTER AND SERVANT, 43.
Contributory negligence of servant, see MASTER AND SERVANT, 26, 40 44.
Condition of coal mine after accident, see MASTER AND SERVANT, 36.
Opinion evidence as to guarding machinery, see MASTER AND SERVANT, 37.
Of usual construction of trestles, see MASTER AND SERVANT, 38.
Of modification of building contract, see MECHANICS' LIENS, 2.
Character of deed as mortgage, see MORTGAGES.
In proceeding to assess benefit to land by reason of public improvement, see MUNICIPAL CORPORATIONS, 9.
In action for damages caused by negligence, see NEGLIGENCE, 2.
Newly discovered as ground for new trial, see NEW TRIAL, 5-8.
Verdict or findings contrary to evidence, see NEW TRIAL, 3.
For compensation of agent, see PRINCIPAL AND AGENT, 1.
To sustain conviction of rape, see RAPE.
In suits to reform written instrument, see REFORMATION OF INSTRUMENTS.
Parol evidence to vary written contract of sale, see SALES, 2.
For price of good sold, see SALES, 4, 5.

EVIDENCE—CONTINUED.

Comment on by judge at trial, see TRIAL, 2.
Indecent exposure of person at trial, see TRIAL, 3.
Instructions as to preponderance of evidence, see TRIAL, 5.
Resulting trust, see TRUSTS, 1.
Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. EVIDENCE — COMPETENCY — EXPERIMENTS. Upon an issue as to whether a place was well lighted, where evidence of experiments with a similar light was offered, the determination of the preliminary questions as to whether the conditions were substantially similar is largely discretionary; and the quantity of light given out by an arc light is not so unvarying at all times as to make it an abuse of discretion to exclude evidence thereof. *Lasityr v. Olympia* 651

2. EVIDENCE—ABSENT WITNESSES—EXCUSE FOR FAILURE TO PRODUCE—MATERIALITY. It is not error to exclude explanation of the absence of a witness, where no showing was made as to the materiality of his testimony or of the relation in which he stood to the parties. *Merrill v. Stephens & Co*..... 28

3. EVIDENCE—RES GESTAE—WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. Where the statute renders incompetent the evidence of declarations by a deceased person respecting his title to the property in dispute, it cannot be received as a part of the *res gestae*. *Dempsey v. Dempsey*..... 632

4. EVIDENCE—SELF-SERVING DECLARATIONS. In an action against a widow to quiet title, evidence of declarations to third persons by her deceased husband as to his interest in the property are inadmissible as self-serving. *Dempsey v. Dempsey*..... 632

5. SAME—DECLARATIONS—ADMISSIONS AGAINST INTEREST. A declaration by a father, at the time of the purchase of property in his son's name, that the deed was so taken to secure advances made to him by the son, must be measured in the light of the whole transaction, and is not necessarily a declaration against interest merely because it shows an indebtedness. *Dempsey v. Dempsey*..... 632

6. EVIDENCE—PAROL TO VARY WRITING—CONTRACTS—MODIFICATION. A written contract to convey land, fixing the time for payments, with provisions for forfeiture, cannot be varied by parol proof of a modification whereby the vendor agreed not to declare a forfeiture for five years if the vendee would plant and cultivate an orchard and remain on the land. *Spokane Canal Co. v. Coffman*..... 357

7. EVIDENCE—PAROL EVIDENCE—RECEIPT—CONTRACT. A mere receipt for money paid is not a contract or conclusive, and parol evidence of overpayment is admissible without showing fraud, coercion or mutual mistake. *Gronning v. Elliott Bay Mill & Lumber Co*..... 676

EVIDENCE—CONTINUED.

8. EVIDENCE—EXPERTS—OPINIONS. Opinion evidence is inadmissible to prove negligent construction where twenty-five bents, fourteen to twenty-seven feet high, unsupported by braces, collapsed, when hauled from one end by a team on a block and tackle; since the matters were within common knowledge. *Christensen v. Hawley* 14

9. EVIDENCE—OPINION EVIDENCE—EXPERTS — BLASTING. In blasting work, the feasibility of preparing a barricade to protect the workmen is not a matter of expert proof. *Johnson v. Anderson*.... 100

EXAMINATION:

Of witnesses in general, see WITNESSES.

EXCESSIVE DAMAGES:

See DAMAGES, 3-12.

EXCUSE:

Explaining absence of witness, see EVIDENCE, 2.

EXECUTORS AND ADMINISTRATORS:

1. EXECUTORS AND ADMINISTRATORS—TRUSTS—PURCHASE BY TRUSTEE—SALE—SETTING ASIDE—ACQUIESCENCE. The act of an executor and trustee, in permitting his wife to acquire, at a discount, claims of creditors of the estate, to pay for property sold to creditors pursuant to a plan to satisfy claims and save the estate from insolvency, cannot be objected to by residuary legatees of the *cestui que* trust, the widow of the deceased, who for four years prior to her death acquiesced in the proceeding with full knowledge of all the facts, while she and all such purchasers profited greatly by the increased value of the property taken by them; since the sale to the trustee's wife was not absolutely void, but only voidable. *Lewis v. Hill*.. 304

EXHIBITION:

Physical exhibition of person at trial, see TRIAL, 3.

EXPERIMENTS:

Competency of as evidence, see EVIDENCE, 1.

EXPERT TESTIMONY:

In civil actions, see EVIDENCE, 8, 9.

EXPLOSIVES:

Opinion evidence as to use of barricade to protect workmen, see EVIDENCE, 9.

Injury from explosion of gas in coal mine, see MASTER AND SERVANT, 8, 36.

EXPLOSIVES—CONTINUED.

1. EXPLOSIVES—BLASTING—CONTRIBUTORY NEGLIGENCE. A nonsuit is properly granted where plaintiff, a man of experience with explosives and blasting, had warning of a blast and after taking up a place of safety by a tree, left the same and came out in the open, relying upon his ability to watch and dodge the flying rocks. *Johnson v. Anderson*..... 100

2. EXPLOSIVES—WARNING—EVIDENCE OF CUSTOM—ADMISSIBILITY. The custom of giving warning of a blast is properly excluded as immaterial, where plaintiff received adequate warning. *Johnson v. Anderson* 100

EXPULSION:

Of member of baseball league, see ASSOCIATIONS.

FACTORY ACT:

Guarding dangerous machinery, see MASTER AND SERVANT, 9-11, 18, 19, 33, 37, 47, 48, 50, 51.

FALSE PRETENSES:

Evidence of other offenses, see CRIMINAL LAW, 7.

1. FALSE PRETENSES—EVIDENCE — CONSPIRACY — ADMISSION OF CODEFENDANT. In a prosecution for obtaining money under false pretenses through a conspiracy with a swindling clairvoyant, photographs of the latter, in oriental costume, with writings thereon, of which he was author, scoffing at the gullibility of his victims, are admissible in evidence. *State v. Craddick*..... 425

2. FALSE PRETENSES—DEFENSES—RESTITUTION. In a prosecution for obtaining money under false pretenses for worthless stock, evidence of the value of land traded to the prosecuting witness in restitution is inadmissible, that being no defense. *State v. Craddick*..... 425

FALSE REPRESENTATIONS:

See FRAUD.
As ground for rescission of sale of personalty, see SALES, 1.

FELLOW SERVANTS:

See MASTER AND SERVANT, 13, 14, 16, 17.

FILING:

Statement of facts in lower court, see APPEAL AND ERROR, 10, 11.
Of firm name as condition to bringing suit, see PARTIES.

FINDINGS:

Review on appeal or writ of error, see APPEAL AND ERROR, 19-24.
Necessity for including in transcript, see APPEAL AND ERROR, 8.
Special finding by jury, see TRIAL, 9.

FIRE INSURANCE:

See INSURANCE.

FIRES:

Assignability of action for damages, see ASSIGNMENTS.

1. FIRES—ACTIONS—DEFENSES—RAILROADS—RIGHT OF WAY—DEEDS—WAIVER OF DAMAGES. A waiver of damages in a right of way deed, for loss sustained by reason of the location, construction and operation of a railroad thereon, does not preclude recovery for loss by reason of a fire carelessly set out on the right of way by the contractors constructing the road. *Jordan v. Welch*..... 569

2. FIRES—NEGLIGENCE—RAILROAD CONTRACTORS—DUTY. It is actionable negligence for railroad contractors in construction work to deposit sparks or live coals, from an engine operating a steam shovel, upon the right of way, and allow the fire to spread to an adjoining meadow, during the dry season when the soil was easily ignited, irrespective of any negligence in operating the engine; since it was their duty to take precautions against the communication of the fire to adjoining lands. *Jordan v. Welch*..... 569

FIXTURES:

Subjection of trade fixtures to mechanics' lien, see MECHANICS' LIENS. 1.

FORBEARANCE:

To collect an account as consideration for contract of guaranty, see GUARANTY, 1.

FORCE:

Assault with intent to commit rape by force, see RAPE.

FORECLOSURE:

Of mechanics' lien, see MECHANICS' LIENS.

FORFEITURE:

Of corporate franchise for nonpayment of annual license fee, see CORPORATIONS, 7-9.

Of insurance policy, see INSURANCE.

Waiver of right to forfeiture for nonpayment of principal or interest, see VENDOR AND PURCHASER, 6.

FORMER ADJUDICATION:

See JUDGMENT.

FORNICATION:

Lascivious cohabitation or conduct, see LEWDNESS.

FRANCHISES:

Acts impairing exclusive grants and franchises, see CONSTITUTIONAL LAW, 1.

Forfeiture of corporate franchise for nonpayment of annual license fee, see CORPORATIONS, 7-9.

For street railway, see STREET RAILROADS, 1-17.

FRAUD:

See FALSE PRETENSES.

Of agent in sale of land, see PRINCIPAL AND AGENT, 2.

As ground for rescission of sale of personalty, see SALES, 1.

Necessity of pleading, see SPECIFIC PERFORMANCE.

Of vendor avoiding contract of sale of land, see VENDOR AND PURCHASER, 5.

1. FRAUD—ACTIONABLE REPRESENTATIONS. Upon a conspiracy to defraud, whereby plaintiff was induced to put up the money to purchase a worthless timber claim, representations that defendant's client had agreed to purchase the claim and that a cruise had been made showing it to be valuable, are actionable. *Merritt v. Hibbard* 368

2. FRAUD — PLEADINGS — COMPLAINT — SUFFICIENCY. A complaint states a good cause of action for conspiracy to defraud, where it is alleged that the plaintiff was induced by the defendants, through false representations and a prior course of dealing, to put up $3,000 to pay for a worthless timber claim which one of the defendants had agreed to repurchase for a client at an advance. *Merritt v. Hibbard* 368

3. SAME—ALLEGATIONS OF VALUE—DAMAGES. In such a case, an allegation that the claim was of no value is not essential to the recovery of damages, where the plaintiff was induced to put up the money and was not to take any title, the name of the grantee in the deed being left blank and to be filled in on the resale to defendant's client. *Merritt v. Hibbard*..... 368

4. FRAUD—EVIDENCE—ADMISSIBILITY. Upon a conspiracy to defraud, whereby plaintiff was induced to purchase a worthless timber claim, evidence of the small value of the claim is admissible. *Merritt v. Hibbard* 368

5. FRAUD—EVIDENCE TO ESTABLISH—SUFFICIENCY. Fraud in an accounting and settlement, which resulted in the plaintiff's execution of a note and mortgage for $11,000 for the balance found due, is not established by clear and convincing testimony, where the plaintiffs claimed that the note was represented to them as being drawn for $1,100, and they knew at the time that they were indebted in a much larger sum, and the evidence of the defendants indicates that the original accounting was correct. *Pickle v. Lincoln County State Bank* 545

FRAUDS, STATUTE OF:

1. FRAUDS, STATUTE OF — PROMISE ON DEBT OF ANOTHER — ORIGINAL PROMISE. A foreign corporation is liable for the purchase price of machinery, as upon an original oral promise, and the transaction is not within the statute of frauds, where its agent told plaintiff he had a job for him, and a week later came to plaintiff and gave the measurements for a blow pipe system to be installed in the mill of another company, ordered the goods, and on plaintiff's objection that such company did not have good financial standing, directed plaintiff to send the bill to such company and "we will pay the bill," it appearing that the leading object of the defendant company in installing the system was to enable the mill to fill defendant's orders for lumber. *Burns v. Bradford-Kennedy Lumber Co.*... 276

2. FRAUDS, STATUTE OF—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR. An oral contract whereby a vendor agreed not to declare a forfeiture of a contract to purchase land for five years, if the vendee would plant and cultivate an orchard and remain on the land, is void under the statute of frauds requiring contracts not to be performed within one year to be in writing. *Spokane Canal Co. v. Coffman* 357

3. FRAUDS, STATUTE OF — BROKERS — COMMISSIONS — ORAL CONTRACT. Rem. & Bal. Code, § 5289, providing that an agreement employing an agent or broker to sell real estate for compensation or commissions shall be void unless in writing, applies only to contracts between the owner of the land and the agent to sell, and an oral contract between brokers to divide commissions is valid. *Jones v. Kehoe*..... 422

FRAUDULENT REPRESENTATIONS:

As ground for rescission of sale of personalty, see SALES, 1.

GOOD FAITH:

Necessity for claim of title in, see ADVERSE POSSESSION.

GUARANTY:

Contracts of suretyship, see PRINCIPAL AND SURETY.

1. GUARANTY—CONTRACT—CONSIDERATION. Forbearance to collect an account from a logger, and extension of credit for further supplies enabling the debtor to continue logging, is a sufficient consideration for a contract by a lumber company to guarantee the account to the extent of fifty cents per M for all logs furnished it; all parties being thereby benefited. *Schoening v. Maple Valley Lumber Co*..... 332

2. GUARANTY—CONTRACT—CERTAINTY—MUTUALITY. An agreement to guarantee a logger's account to the extent of fifty cents per M on each raft of logs furnished to the promisor until notice given to the promisee, is an original undertaking, and not void for uncertainty or want of mutuality. *Schoening v. Maple Valley Lumber Co*... 332

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 25-45.
In criminal prosecutions, see CRIMINAL LAW, 9, 14, 15.

HIGHWAYS:

Defects or obstructions in city streets, see MUNICIPAL CORPORATIONS, 20, 22, 25.
Collisions between street cars and vehicles, see STREET RAILROADS, 18.

1. HIGHWAYS—OBSTRUCTION—SPECIAL DAMAGES. The obstruction of a highway may be enjoined by one who suffers a special damage in that he uses the highway at least twice a day to go from his residence to another tract which he was farming, and the obstruction required him to use another road with worse grades and twice the distance. *Ingalls v. Eastman* 289

2. HIGHWAYS—AUTOMOBILES—NEGLIGENCE—FAILING TO STOP. Negligence in failing to stop an automobile, upon signal by the driver of a horse that had taken fright, is sufficient to sustain a verdict for the plaintiff, even though the other grounds of negligence were not made out. *Brown v. Thorne* 18

3. SAME—NEGLIGENCE—NOISES. The right to operate an automobile carries the right to make the usual noises incident thereto. *Brown v. Thorne* 18

4. SAME—NEGLIGENCE—FAILING TO STOP—PRESUMPTION. Where a horse has been excited and became unmanageable, it is the duty of the operator of an automobile to stop the machine, as it is presumed to be always under control. *Brown v. Thorne* 18

5. SAME—NOTICE OF ROAD. The driver of an automobile must take notice of the road, and it is his duty to stop on signal, if he can without accident, when requested to do so by the driver of a horse not under control. *Brown v. Thorne* 18

HOMICIDE:

1. HOMICIDE—MURDER IN FIRST DEGREE—INDICTMENT AND INFORMATION—SUFFICIENCY. An information charging that the accused did, with premeditated design to effect her death, kill and murder A. J. by beating and mortally wounding, etc., follows the language of Rem. & Bal. Code, § 2392, defining murder in the first degree, and is sufficient without further alleging that the person died. *State v. Jahns* 636

2. HOMICIDE—DEFENSE—INSANITY—EVIDENCE—ADMISSIBILITY. Upon the defense of insanity to a charge of murder of accused's wife, after a foundation is laid by some evidence of mental aberration, it is error to exclude evidence that the wife, an Indian, had joined the Shakers, a religious organization practicing promiscuous illicit intercourse, whereby the accused was so greatly distressed in mind

HOMICIDE—CONTINUED.

that his reason was dethroned; since he was entitled to the benefit of any competent evidence tending to account for or naturally lead up to insanity; and the delusion of marital infidelity is a recognized symptom of homicidal insanity. *State v. Flanney*..... 482

HORSE STEALING:

See LARCENY.

HOSPITALS:

Maintenance of sanitarium as nuisance, see NUISANCE, 1.

HUSBAND AND WIFE:

As party entitled to allege error, see APPEAL AND ERROR, 13.
Liability as joint indorsees, see BILLS AND NOTES, 2.
Divorce and judicial separation, see DIVORCE.
Estoppel of wife to claim property after divorce, see ESTOPPEL, 1.

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—ATTACHMENT—LIEN—BONA FIDE PURCHASER FROM WIFE. Where community real property, record title to which was in the wife, is attached in a suit for a community debt, brought against the husband alone, the attachment is not notice to a subsequent *bona fide* purchaser from the wife, and such purchaser is not bound to take notice of the attachment lien indexed in the name of the husband and not shown in an abstract of title. *Anders v. Bouska*..... 393

2. HUSBAND AND WIFE—ACTIONS—JUDGMENT AGAINST COMMUNITY—LIABILITY OF WIFE. A judgment against L. R. and the community composed of L. R. and E. R., husband and wife, merely establishes the community character of the debt, and is not a personal judgment against the wife. *White v. Ratliff*..... 383

3. HUSBAND AND WIFE—COMMUNITY PROPERTY—EFFECT OF DIVORCE. Upon the granting of a divorce without making any disposition of property, the community is dissolved and the parties become tenants in common of the community property. *Barkley v. American Savings Bank & Trust Co*..... 415

4. HUSBAND AND WIFE—COMMUNITY PROPERTY—RIGHTS AFTER DIVORCE—CONVERSION. After a divorce, whereby a husband's control over community property ceased and his interest became that of a tenant in common by operation of law, he can recover for a conversion prior to the divorce no more than the value of his half interest. *Barkley v. American Savings Bank & Trust Co*..... 415

IDENTITY:

Evidence of identity of accused, see CRIMINAL LAW, 2, 3.

IMPEACHMENT:

Of contract limiting liability of carrier, see CARRIERS, 1.

IMPROVEMENTS:

Liens, see MECHANICS' LIENS.
Public improvements, see MUNICIPAL CORPORATIONS, 6-19.

INCORPORATION:

Of town in dry territory and right to license sale of liquor, see INTOXICATING LIQUORS, 2.

INCUMBRANCES:

See MECHANICS' LIENS; MORTGAGES.

INDEMNITY:

See GUARANTY.
Misjoinder of causes in action on injunction bond, see ACTION.
Injunction bond, see INJUNCTION, 1.
Contracts of suretyship, see PRINCIPAL AND SURETY.

INDEPENDENT CONTRACTORS:

Liability of master for injuries to independent contractor, in general, see MASTER AND SERVANT, 58.

INDIANS:

Civil status of child born of Indian mother, see CITIZENS.

1. INDIANS—SALE OF LIQUORS—PROHIBITION—CONSTITUTIONAL LAW—POLICE POWER—PRIVILEGES. Under the police power the legislature can prohibit the sale of liquor to an Indian of mixed blood, although he be a citizen of the United States, without violating the rights and privileges guaranteed by § 1 of the fourteenth amendment to the Federal constitution. *State v. Nicolls*..... 142

2. SAME—INDIANS OF MIXED BLOOD—STATUTES. A statute prohibiting the sale of liquor to an Indian of mixed blood having more than one-eighth Indian blood applies to all such Indians, regardless of the legal status of his white father. *State v. Nicolls*..... 142

3. INDIANS—SALE OF LIQUORS—POHIBITION—INTENT. The element of intent is not a necessary ingredient of the offense of selling liquor to an Indian of the mixed blood, the statute not using the word "knowingly" or any qualifying words. *State v. Nicolls*..... 142

INDICTMENT AND INFORMATION:

See HOMICIDE, 1.
Indorsement of witnesses on information, see CRIMINAL LAW, 9.

1. INDICTMENT AND INFORMATION—DUPLICITY—LARCENY. An information for larceny is not bad for duplicity in that it charges the stealing of specified articles from the persons of, and belonging to, two parties, where *prima facie*, both occurred at the same time and place and constituted but a single transaction. *State v. Laws*.. 533

INDICTMENT AND INFORMATION—CONTINUED.

2. INDICTMENT AND INFORMATION—DEGREES OF OFFENSE INCLUDED—ASSAULT. An information charging first degree assault with intent to kill by stabbing with a knife sustains a conviction for second degree assault with intent to do "grievous bodily harm," or that the "weapon or other instrument or thing was likely to produce bodily harm," under Rem. & Bal. Code, § 2414. *State v. Letica*..... 629

INDORSEMENT:

Of bill of exchange or promissory note, see BILLS AND NOTES, 2.
Of names of witnesses on information, see CRIMINAL LAW, 9.

INFANTS:

Child of Indian mother as citizen, see CITIZENS.
Warning and instructing minor employees, see MASTER AND SERVANT, 12.

1. INFANTS—MINORS IN POOL ROOMS—INTOXICATING LIQUORS—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 2445, making it a gross misdemeanor to allow minors in any drinking saloon, dance house, public pool or billiard hall, concert saloon . . . "where intoxicating liquors are sold," the quoted words qualify all the preceding terms, and it is not an offense to allow minors in pool rooms in which no intoxicating liquors are sold; and if capable of two constructions, the one in favor of innocence must be adopted. *State v. Anderson* 674

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INJUNCTION:

Misjoinder of causes in action on bond, see ACTION.
Enjoining obstruction of wharf by operation of drawbridge, see EMINENT DOMAIN, 2.
Obstruction of highway, see HIGHWAYS, 1.
Enjoining canvass of returns of illegal election, see MUNICIPAL CORPORATIONS, 4.
Abatement of nuisance, see NUISANCE.
Enjoining decision of board of public works respecting street railway route, see STREET RAILROADS, 9.

1. INJUNCTION—JURISDICTION—ELECTIONS—MUNICIPAL CORPORATIONS—POLITICAL QUESTIONS. An injunction against the canvassing of returns of an illegal city election for the annexation of territory involves property rights, and a court of equity will not refuse jurisdiction on the ground that only a political question is involved. *Wilton v. Pierce County*..... 386

INJUNCTION—CONTINUED.

2. INJUNCTION—BONDS—INDEMNITY—DAMAGES RECOVERABLE. In an action on an injunction bond, to indemnify plaintiffs from damages by reason of a temporary restraining order, until the hearing could be had, returnable May 15, it is not error to allow the plaintiff to show damages suffered up to May 22, at which time the hearing was had and the order dissolved, where it appeared that the plaintiff required that additional time in order to prepare for the hearing. *Maughlin Mill Co. v. Hamilton*..... 66

INSANITY:

Admissibility of evidence to show insanity in prosecution for murder, see HOMICIDE, 2.

INSTRUCTIONS:

Time and manner of taking exceptions to, see APPEAL AND ERROR, 4-6.

Review as dependent on presentation of objection in lower court, see APPEAL AND ERROR, 4-6.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 39-44.

In criminal prosecutions, see CRIMINAL LAW, 14, 15.

Warning or instructing servant of dangers of employment, see MASTER AND SERVANT, 3, 12, 26, 30, 42, 45.

In prosecution for rape, see RAPE.

In civil actions, see TRIAL, 4-8.

INSURANCE:

Action on accident insurance policy, see DEATH.

1. INSURANCE — POLICY —"OCCUPIED AS SALOON"— CONSTRUCTION. A policy of fire insurance on a building "occupied as saloon," with a forfeiture clause if vacant for more than ten days, does not require that the building be occupied as a saloon, the words being descriptive only; and it is not vacant if in the possession of a watchman of the sheriff under legal process. *Silver v. London Assurance Corporation* 593

2. SAME—CHANGE OF INTEREST—PLEADING—WAIVER OF OBJECTION. In an action on a fire insurance policy, a stipulation forfeiting the policy in case of change of ownership or interest cannot be urged unless it is pleaded. *Silver v. London Assurance Corporation*..... 593

3. SAME—POLICY—BREACH OF CONDITION—VACANCY — REOCCUPANCY. An insurance policy providing that the same shall be void if the building be or become vacant or unoccupied and so remain for ten days, is not terminated, but only suspended during such vacancy, and has no application to a loss occurring after it was reoccupied. *Silver v. London Assurance Corporation*..... 593

INSURANCE—CONTINUED.

4. SAME—CHANGE OF INTEREST—INCREASE OF HAZARD — BURDEN OF PROOF. Under the clause that a fire insurance policy shall be void in case of change of interest or possession, except change of occupancy without increase of hazard, the burden is upon the company to prove that possession of an officer under legal process increased the hazard, as it will not be presumed. *Silver v. London Assurance Corporation* 593

5. INSURANCE—FIRE INSURANCE—VACANCY OF BUILDING—EVIDENCE OF OCCUPATION—SUFFICIENCY. The evidence sufficiently shows that a saloon was not vacant and unoccupied at the time of a fire, Saturday night, where a witness testified that he had rented it on the Monday before, had cleaned and arranged it on Friday and Saturday, had bar fixtures and part of his stock in the building, and had opened for business and made some sales on Saturday. *Silver v. London Assurance Corporation* 593

6. SAME. The evidence warrants a finding that a saloon was not vacant and unoccupied for ten days prior to a fire on June 28th, where the sheriff had possession under legal process and put a watchman in possession who watched the building for ten or fifteen days, beginning as late as June 6th or 7th. *Silver v. London Assurance Corporation* 593

INTENT:

To dedicate land to public use, see DEDICATION.
As necessary element of offense in selling liquor to Indians of mixed blood, see INDIANS.
Assault with intent to commit rape, see RAPE.

INTEREST:

Liability of trustee for, see ACCOUNT, 1.
On notes, see BILLS AND NOTES.
Award in condemnation proceedings, see EMINENT DOMAIN, 4.
Statute as barring recovery for annual interest on contract or judgment, see LIMITATION OF ACTIONS, 2.
Disqualification as witness, see WITNESSES, 1.

INTERPRETER:

Fees of as costs, see COSTS, 2.

INTOXICATING LIQUORS:

Denial of right to sell or drink as violation of constitutional right, see CONSTITUTIONAL LAW, 2.
Selling to Indians, see INDIANS.
Allowing minors in pool rooms where liquors are sold, see INFANTS.
Intoxication of witness as ground for new trial, see NEW TRIAL, 7.

1. INTOXICATING LIQUORS—LOCAL OPTION — CONSTITUTIONALITY. The local option law of this state is constitutional. *State v. Donovan* 209

INTOXICATING LIQUORS—CONTINUED.

2. SAME — INCORPORATION OF TOWN IN DRY TERRITORY — STATUTES — CONSTRUCTION. Under the local option law making a separate unit or district of all that portion of a county outside of incorporated cities and towns, and which failed to contemplate the situation where a new town is subsequently incorporated within the prohibition district, such newly incorporated town may license the sale of intoxicating liquors within the municipality, as it might have done if previously incorporated, and without first submitting the matter to a vote. *State v. Donovan*..... 209

JOINDER:

Of causes of action, see ACTION.

JUDGES:

Misconduct of judge as ground for reversal, see APPEAL AND ERROR, 27-29.
Conduct of judge in criminal trial, see CRIMINAL LAW, 12.
Conduct of judge in civil trial, see TRIAL, 1, 2.

JUDGMENT:

Review in general, see APPEAL AND ERROR.
Appealability, see APPEAL AND ERROR, 1.
Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 46-48.
Costs on modification, see COSTS, 3.
In condemnation proceedings, see EMINENT DOMAIN, 3, 4.
In action relating to community property, see HUSBAND AND WIFE, 2.
On the pleadings, see PLEADING, 3.

1. JUDGMENT—RES JUDICATA—MATTERS AND PARTIES CONCLUDED. A judgment in an action, apparently a moot case to determine the validity of a contract for a city water extension, in which the validity of the preliminary ordinances was assumed, and the contractor and the city were working in harmony to sustain the contract, attacked as illegal on other grounds, is not *res judicata* in a second action by the contractor against the city for breach of the contract, defended by the city on the ground that the preliminary ordinance authorizing the contract was void; since the matters involved and the parties in the second suit were different. *Savage v. Tacoma*.. 1

2. JUDGMENT—RES JUDICATA — BAR — MATTERS CONCLUDED. The dismissal of an action to specifically enforce a public sale of county property, on the ground that no bad faith of the officials appeared, is *res judicata* and a bar to another action between the same parties to enforce the same contract on the allegations of bad faith, that having been set up in the first complaint in the former action and abandoned by the filing of an amended complaint. *McPherson Brothers Co. v. Okanogan County*..... 239

JUDGMENT—CONTINUED.

8. JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. The dismissal of an action to rescind a contract to support the plaintiff, on the ground that plaintiff had violated the contract in refusing to live with the defendant since August 20th, 1908, is *res judicata* and a bar to another action to rescind the same contract for failure to support the plaintiff from August 20th, 1908, to August 20th, 1909, commenced within fifty days after the entry of the former judgment; no breach since such judgment being alleged. *Gladden v. Jacobowski*..... 242

JUDICIAL POWER:

Dissolution of corporation for failure to pay license fee as encroachment on judiciary, see CONSTITUTIONAL LAW, 8.

JURISDICTION:

Appellate jurisdiction in general, see APPEAL AND ERROR.
Of appellate court after remand, see APPEAL AND ERROR, 49.
In injunction proceedings, see INJUNCTION, 1.
Review of assessment proceedings, see MUNICIPAL CORPORATIONS, 19.

JURY:

Harmless error in polling jury, see APPEAL AND ERROR, 28.
Instructions in criminal prosecutions, see CRIMINAL LAW, 14, 15.
Custody and conduct, see CRIMINAL LAW, 11.
Misconduct of juror as ground for new trial, see NEW TRIAL, 1.
Impeachment of verdict by testimony or statements of jurors, see NEW TRIAL, 9.
Instructions in civil actions, see TRIAL, 4-8.

1. JURY—RIGHT TO JURY TRIAL — FEDERAL CONSTITUTION — APPLICATION. The Federal constitutional guaranty of a trial by an impartial jury has no application to prosecutions in a state court for the violation of state laws. *State v. McDowell*..... 398

2. SAME—RIGHT INVIOLATE—QUALIFICATION OF JURORS. Const., art. 1, § 21, providing that the right to trial by jury "shall remain inviolate," is not violated by Rem. & Bal. Code, § 94, requiring jurors to be taxpayers; since the constitutional guaranty and all the essential incidents of trial by jury are preserved. *State v. McDowell* 398

3. JURY—QUALIFICATION OF JUROR—TAXPAYER. Under Rem. & Bal. Code, § 94, an elector and taxpayer of the state of Washington is a qualified juror, and a juror need not be a taxpayer within the county in which he is called. *State v. Jahns*..... 636

4. JURY—QUALIFICATIONS—TAXPAYER. Under Rem. & Bal. Code, § 94, requiring a juror to be a taxpayer of the state of Washington, it is not sufficient to disqualify a juror to show that he was not a taxpayer of the county. *Lasityr v. Olympia*..... 651

JURY—CONTINUED.

5. JURY—DRAWING—TIME FOR SERVICE—CHALLENGE TO PANEL. The requirement that a jury be drawn for "the ensuing month," is not so material as to invalidate a panel part of whom were drawn for the month of December, but not summoned until January, because there was no jury business for the month of December, in view of Rem. & Bal. Code, § 2140, providing that challenges to the panel shall only be allowed for a material departure from the prescribed forms. *State v. Leroy* 405

6. JURY—COMPETENCY—CHALLENGES—WAIVER OF OBJECTION. Error, if any, in denying a challenge to a juror for actual bias, is waived, where the state withdrew its opposition, and the court offered to permit the defense to again exercise its challenge, the defense refusing to avail itself thereof or to take any action thereon. *State v. Jahns* 636

JUSTICES OF THE PEACE:

Right to amend complaint on appeal from justice court, see CRIMINAL LAW, 1.

KNOWLEDGE:

Of master of acts resulting in injury to servant, see MASTER AND SERVANT, 14.

LACHES:

Effect on equity, see EQUITY.
In mandamus proceedings, see MANDAMUS.
To rescind contract for sale of personalty, see SALES, 1.

LANDLORD AND TENANT:

Mechanic's lien for improvements by tenant, see MECHANICS' LIENS, 1.

1. LANDLORD AND TENANT—LEASE—CONDITION OF PREMISES—TERMS—CONSTRUCTION. A lease providing that the lessor shall arrange the premises for a kitchen and cafe "as in its judgment shall be best," and prohibiting the lessee from making other use of the same, does not make the lessor the sole judge of the fitness of the place to the extent of relieving it of all obligation to produce the results contemplated. *Hardman Estate v. McNair* 74

2. LANDLORD AND TENANT—RIGHTS OF TENANT—REMOVAL OF BUILDING—SALE OF PREMISES. A lessee, who erected a building on the premises under a recorded lease giving her the right to remove it, cannot recover the alleged price of the building from the lessor on his sale of the premises to one having notice of the lease; since the building still belonged to the lessee who remained in possession with the right of removal. *Morin v. Bremer* 62

LANDLORD AND TENANT—CONTINUED.

3. LANDLORD AND TENANT—RENTS—LEASE—CONDITION OF PREMISES—IMPLIED WARRANTY. Where, by the terms of a lease, the premises were to be arranged by the lessors for a cafe and kitchen, and the lessees were prohibited from making any other use of the same, the lessor cannot recover rent without complying with the lease, nor invoke the general rule that there is no implied warranty of the fitness of demised premises. *Hardman Estate v. McNair*..... 74

LANDS:

See PUBLIC LANDS.

LARCENY:

Duplicity of information, see INDICTMENT AND INFORMATION, 1.

1. LARCENY—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a conviction for horse stealing, notwithstanding conflicting evidence establishing an alibi, where there was testimony that the horses were in the owner's pasture on May 4th, twenty miles southeast of W., that on May 4th at W. the accused obtained leave of A., the younger, to put four or five horses in the pasture of A. and his father, 12 miles north of W., that the accused and his brother were seen with the four young horses on the road to the pasture May 4th, 5th, or 6th, to which they added an old horse of accused's brother when near the pasture, and the accused notified the elder A. about noon on May 5th that he had turned five horses into the pasture with his son's consent, and the elder A. saw the four young horses there, freshly branded, with an older horse on May 9th, a note book in the accused's possession contained a memorandum evidently in his handwriting to the effect that he "Put four horses in pasture May the 5th, 1909," (the accused denying the writing of the memorandum), and that accused lived near the pasture where the animals were found until May 1st, when he went to work about three miles from the place from which the horses were stolen. *State v. Gray*..... 549

LAW OF THE CASE:

Decision on appeal as law of the case on new trial, see APPEAL AND ERROR, 46-48.

Res adjudicata, see JUDGMENT.

Instructions as law of case, see TRIAL, 8.

LEASES:

See LANDLORD AND TENANT.

LEAVE OF COURT:

Necessity in actions by or against receivers, see RECEIVERS.

LEWDNESS:

1. LEWDNESS—LIVING WITH PROSTITUTE—SEX OF ACCUSED—EVIDENCE—SUFFICIENCY. In a prosecution of a male person for living with and accepting the earnings of a prostitute, the objection that there was no evidence that he was a male person is without merit, where he appeared before the jury, responded to masculine pronouns addressed to him, and his sex was not made an issue. *State v. Risaburo* 162

2. SAME—ACCEPTING EARNINGS—EVIDENCE—SUFFICIENCY. A conviction of living with and accepting the earnings of a prostitute, is supported by evidence of confessions and admissions, and the fact that the accused had lived for years with the same prostitute without other visible means of support. *State v. Risaburo*..... 162

LICENSES:

Annual license fee of corporation, see CORPORATIONS, 6-9.
Sale of intoxicating liquors, see INTOXICATING LIQUORS.
Injuries to licensees, see NEGLIGENCE, 1.
Physicians and surgeons, see PHYSICIANS AND SURGEONS.
Use of streets by licenses to street railway company, see STREET RAILROADS.

LIENS:

Record of attachment lien as notice to *bona fide* purchaser from wife, see HUSBAND AND WIFE, 1.
Liens of mechanics and materialmen, see MECHANICS' LIENS.
Mortgage liens, see MORTGAGES.
For taxes paid, see TAXATION.

LIMITATION OF ACTIONS:

Effect of laches on action to quiet title, see EQUITY.

1. LIMITATION OF ACTIONS—TOLLING STATUTE—ABSENCE. The statute of limitations is not tolled by absence of the debtor from the state, where his business kept him out of the state only part of the time, and at all times he maintained a home in this state at which his wife and children resided, and where service of process could have been made under Rem. & Bal. Code, § 226, regardless of any distinction between domicile and residence. *Crowder v. Morphy*..... 626

2. LIMITATION OF ACTIONS—BAR OF PRINCIPAL DEBT—ANNUAL INSTALLMENTS OF INTEREST. A contract for annual installments of interest is merged in the judgment thereon, and the statute of limitations running against the judgment bars any recovery for annual interest on the contract or judgment. *Crowder v. Morphy*..... 626

LIQUORS:

See INTOXICATING LIQUORS.

LIVE STOCK:

Carriers of, see CARRIERS.

LOCAL OPTION:

Licensing sale of liquor in town incorporated in dry territory, see INTOXICATING LIQUORS, 2.

LOGS AND LOGGING:

Action for price of logs, see SALES, 4, 5.

MACHINERY:

Statutory duty to guard, see MASTER AND SERVANT, 9-11, 18, 19, 33, 37, 47, 48, 50, 51.
Sale of, see SALES, 2, 3.

MANDAMUS:

To reinstate membership in baseball league, see ASSOCIATIONS, 4.

1. MANDAMUS—WHEN LIES—ADEQUATE REMEDY BY APPEAL. Mandamus does not lie to review the action of the board of medical examiners in refusing a license to practice, there being an adequate remedy by appeal, under Rem. & Bal. Code, § 8399. *State ex rel. Brunn v. State Board of Medical Examiners*..... 623

2. SAME. The adequacy of the remedy by appeal is not affected by the failure of the party to avail himself thereof within the statutory period. *State ex rel. Brunn v. State Board of Medical Examiners* 623

MARRIAGE:

Relation of husband and wife, privileges and disabilities of coverture, and separation by agreement, see HUSBAND AND WIFE.

MASTER AND SERVANT:

Harmless error in action for injuries, see APPEAL AND ERROR, 37, 41, 43, 44.
Inadequate or excessive verdict for personal injuries, see DAMAGES.
Right of employment as property, see PROPERTY.
Indecent exposure of person of plaintiff in action for injuries, see TRIAL, 3.

1. MASTER AND SERVANT—BLACKLISTING—DAMAGES. Damages are recoverable by a servant, where on giving notice to his employer that he was quitting to take a better job, the employer objected, and prevented the servant from securing the other job by notifying the prospective employer not to employ the plaintiff and that if he did so defendant would withdraw his custom and discontinue business relations existing between them. *Jones v. Leslie*..... 107

MASTER AND SERVANT—CONTINUED.

2. MASTER AND SERVANT—VICE PRINCIPALS—EVIDENCE OF AUTHORITY —ADMISSIBILITY. In an action against a city for injuries sustained by an employee in an electric light station, evidence of the acts of persons claimed to be in charge is admissible to show their authority to give orders and represent the city. *Haggard v. Seattle* 499

3. MASTER AND SERVANT — INJURIES — NEGLIGENCE — SIGNALS — SAFE PLACE. It is actionable negligence for the foreman of a log loading crew to give the signal for the starting of the winch before the tong tender had time to get out of the way of the log to which he had attached the tongs for the purpose of loading it onto a car. *Hall v. Northwest Lumber Co.* 351

4. MASTER AND SERVANT—NEGLIGENCE—SAFE APPLIANCES. A corporation, engaged in the construction of a building, cannot be assumed to be negligent in furnishing an insufficient nail to hold the bricklayer's line, where there was no testimony that it had furnished any nail, and one of the witnesses testified that it was customary for the masons to select the nails. *Cavelin v. Stone & Webster Engineering Corporation* 375

5. MASTER AND SERVANT—NEGLIGENCE—APPROACH TO MILL. A master is not liable to a planerman in a mill who, on invitation of a night watchman, left his working place to eat his lunch at a more suitable place, and upon returning over an unsafe approach to the mill, fell and was injured; although the master had not supplied him with any other suitable place to eat his lunch. *Allen v. Chehalis Lumber Co.* 159

6. SAME—COAL MINES—VIOLATION OF STATUTORY PROVISIONS. It is negligence *per se* to fail to comply with the requirement of the coal mine law intended to provide a reasonably safe place for the men to work; and the duty is a nondelegable one. *Delaski v. Northwestern Improvement Co.* 255

7. SAME—STATUTORY PROVISIONS—APPLICATION. The provisions of the coal mine act of 1888, page 41, § 15, expressly limited to "violations of this act" if not superseded has no application to later acts on this subject. *Delaski v. Northwestern Improvement Co.* 255

8. MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—COAL MINE—VENTILATION—WARNING—EVIDENCE—SUFFICIENCY. The evidence sufficiently established that an explosion of gas in a coal mine was caused by a defective ventilating system and defective wiring, where it appears that the mine was never free from marsh gas, which is highly explosive when mixed with air in certain proportions, that before the accident the gas was coming in at a point that was very damp, that the insulation of the electric wiring was defective, whereby an arc was easily formed, a spark igniting the gas, that the explosion occurred at this point when no one was near, and

MASTER AND SERVANT—CONTINUED.

from no other conceivable cause. *Mrozevich v. Western Steel Corporation* 668

9. MASTER AND SERVANT—SAFE APPLIANCES—FACTORY ACT—APPLICATION. The factory act, Rem. & Bal. Code, § 6587, requiring belt shifters in a factory, mill, or workshop where machinery is used, applies to a main power shaft in a printing shop. *Berger v. Metropolitan Press Printing Co.* 35

10. SAME—GUARDING MACHINERY—FACTORY ACT—APPLICATION. The factory act requiring machinery to be guarded is not limited to employees working with the machine, but applies to any employee whose work makes it possible for him to be injured. *Cook v. Danaher Lumber Co.* 118

11. SAME—INSTRUCTIONS. It would seem that an instruction requiring any practicable guard on a shingle saw which would still leave it possible to operate the saw in a way to be "commercially profitable," is the legal equivalent of Rem. & Bal. Code, § 6587, requiring guards for all machinery which it is practicable to guard. *Shaw v. Woodland Shingle Co.* 56

12. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—CUSTOM IN OTHER PLANTS. In an action by an inexperienced youthful employee in a city electric light station, for injuries sustained while working, without instructions, in the high tension room of the plant, it is proper to show whether such is the customary practice in plants of similar character, as tending to show negligence. *Haggard v. Seattle* 499

13. SAME—FELLOW SERVANTS. The negligence of a fellow servant is no defense where negligence on the part of the master is established. *Christensen v. Hawley* 14

14. SAME—NEGLIGENCE—NEGLIGENCE OF FELLOW SERVANT—CUSTOMARY VIOLATION OF RULES. It is no defense to an action for the death of a coal miner that it was due to the negligent act of a fellow servant in firing a blast, during shifts, contrary to the rules, where (1) there were concurring acts of negligence by the master contributing to the injury, or (2) where there had been habitual violations of the rule for three months, from which knowledge of the practice would be imputed to the master. *Delaski v. Northwestern Improvement Co.* 255

15. MASTER AND SERVANT—NEGLIGENCE—VICE PRINCIPAL—PERSON IN AUTHORITY. Where an employee in a printing shop was ordered by the foreman to work under the directions of a pressman, the latter was a vice principal when he called upon the former to help put a belt upon a pulley. *Berger v. Metropolitan Press Printing Co.* 35

MASTER AND SERVANT—CONTINUED.

16. MASTER AND SERVANT—VICE PRINCIPAL—FOREMAN—DUTY OF SUPERINTENDENCE. A foreman of a log loading crew, where the work requires concert of action under immediate and direct supervision, is a vice principal and not a fellow servant of the other members of the crew as to the duty of superintendence delegated to him by the master. *Hall v. Northwest Lumber Co*..... 351

17. MASTER AND SERVANT—FELLOW SERVANTS. Masons engaged in laying brick are fellow servants when stretching a line to mark the outer edge of the wall. *Cavelin v. Stone & Webster Engineering Corporation* 375

18. SAME—ASSUMPTION OF RISKS—FACTORY ACT—EXCEPTIONS—QUESTIONS FOR JURY. Special facts making an exception to the rule that assumption of the risks is no defense to an action for personal injuries, brought out only in the evidence, and resolved by the jury against the appellant on conflicting testimony, furnish no ground for reversal. *Dukette v. Northwestern Woodenware Co*..... 95

19. MASTER AND SERVANT — INJURIES TO SERVANT — FACTORY ACT—GUARDING SHAFTING—APPLICATION—ASSUMPTION OF RISKS. Rem. & Bal. Code, § 6587, requiring the operators of factories and mills to provide suitable safeguards for all shafting "with which the employees . . . are liable to come in contact while in the performance of their duties" can have no application to an accident in which a boy was injured while voluntarily using a shaft as a horizontal bar for gymnastic exercises, and did not come in contact with it in the performance of his duties; and the defense of assumption of risks accordingly applies. *Talkington v. Washington Veneer Co*..... 137

20. MASTER AND SERVANT—SAFE PLACE—COAL MINE—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE. An experienced coal miner, part of whose duty it was to put props under the overhanging coal, has a right to rely on the assurance of the foreman, made after examination in the miner's presence, that the place was safe, and does not assume the risk and is not guilty of contributory negligence in so doing. *Starck v. Washington Union Coal Co*..... 213

21. MASTER AND SERVANT—COAL MINE—SAFE PLACE—ASSURANCE OF FOREMAN. After an unsuccessful attempt to cause a "squeeze" in a coal mine, the assurance of the foreman, after inspection, that the place was safe, is an undertaking of the master and may be relied upon by miners called to the place. *Cox v. Wilkeson Coal & Coke Co.* 343

22. MASTER AND SERVANT — NEGLIGENCE — SAFE PLACE — ASSURANCE—EVIDENCE. Where the foreman of railroad construction work, after a blast and complaint of loose rock, inspected the face of a rock ledge, supervised the barring down of loose rock, and informed tunnel men, who could not see the whole face of the ledge, that the

MASTER AND SERVANT—CONTINUED.

place was safe, they had a right to rely thereon, and the fall of loose rock shortly thereafter is some evidence of negligence on the part of the foreman, it appearing that the place might have been made safe. *Gibson v. Chicago, Milwaukee & Puget Sound R. Co.* 639

23. MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGERS—NATURAL LAWS. A boiler maker of mature years and varied experience, who had done some firing, assumes the risks from a back fire or explosion in a furnace of a boiler which he was firing with sawdust and shavings for fuel, whereby a banked door was blown off, although he testified that he had never seen or heard of such an explosion; since it was due to simple, natural laws of which he was bound to take notice. *Props v. Washington Pulley & Mfg. Co.*.... 8

24. SAME. Merely working in a dangerous place, the risk of which is not assumed by the servant, is not contributory negligence. *Starck v. Washington Union Coal Co.*..... 213

25. SAME—DUE CARE—TEST—INSTRUCTIONS. It is not prejudicial error to make the test of due care the conduct of an "ordinarily prudent man," where it does not stand alone, the jury being told to compare what was done with what would be done by a man acting with ordinary prudence, also considering all the evidence throwing light upon the man's knowledge and intelligence. *Cook v. Danaher Lumber Co.* 118

26. SAME — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. A common laborer at work shoveling gravel on a street car track is not guilty of contributory negligence in not noticing the approach of a street car, where no warning was given according to custom, and he was on the track in the line of his duty and did not see or hear the car. *Budman v. Seattle Electric Co.*..... 281

27. SAME—CONTRIBUTORY NEGLIGENCE — YOUTHFUL EMPLOYEE — QUESTION FOR JURY. Where the evidence is in direct conflict as to the appreciation of danger by a boy fourteen years of age, it is a question for the jury to determine whether he was guilty of contributory negligence in playing on an idle shaft, which would start revolving when the mill started up. *Talkington v. Washington Veneer Co.* 137

28. SAME — UNSAFE METHODS OF WORK — INSTRUCTIONS. Where the court has defined the issues and submitted the law of choice between places to work, it is not error to instruct in the abstract as to the servant's duty to adopt the safer way, and to refuse an instruction based upon the concrete facts of the case. *Cook v. Danaher Lumber Co.* 118

29. SAME—CONTRIBUTORY NEGLIGENCE. A coal miner is not guilty of contributory negligence, as a matter of law, from the fact that he returned to work fifteen minutes after he heard a blast and saw smoke, and remained at work three-quarters of an hour, when he

MASTER AND SERVANT—CONTINUED.

was on his way out when overcome by gas. *Delaski v. Northwestern Improvement Co.* 255

80. SAME—CONTRIBUTORY NEGLIGENCE—FAILURE TO HEED WARNING—INSTRUCTIONS. Where a boy was ordered by the foreman to get down from a shaft upon which he was playing, for the reason that the mill was about to start up, and there was positive evidence that he had time to do so, but stood for a perceptible period of time with his arm on the shaft, it is reversible error to refuse to give an instruction that, if he could have obeyed the order with reasonable diligence and failed to do so, he could not recover. *Talkington v. Washington Veneer Co.*..... 137

81. MASTER AND SERVANT—ACTIONS—PRECEDENT CLAIM—MATERIALITY—TRIAL—OBJECTION. In an action for injuries sustained in a coal mine, it is not material that no claim was made by plaintiff before suit commenced, during some four months after the accident, there being no attempt to show the purpose of such evidence, claimed on appeal to be relevant as showing false testimony by the plaintiff at the coroner's inquest. *Starck v. Washington Union Coal Co.*... 213

82. MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—PLEADINGS—COMPLAINT. A complaint for personal injuries need not specifically allege that the defendants knew, and that plaintiff was ignorant of, the dangers of the working place, where these facts are to be inferred from the facts alleged. *Gibson v. Chicago, Milwaukee & Puget Sound R. Co.*..... 639

83. MASTER AND SERVANT—ASSUMPTION OF RISKS—PLEADING—FACTORY ACT. In an action for personal injuries under the factory act, an answer pleading assumption of risks is properly struck out, where the special circumstances relied on as an exception to the rule that assumption of risks is no defense, were not pleaded in the answer, nor disclosed by the complaint. *Dukette v. Northwestern Woodenware Co.* 95

84. SAME—COAL MINES — LENGTH OF HEADING — STATUTES — PERMISSION—BURDEN OF PROOF. Under Rem. & Bal. Code, § 732, prohibiting the driving of a heading in a coal mine more than sixty feet from the face of each chamber without written permission from the inspector, the burden of proof, after proof of such extension, is upon the coal mine owner to show the fact of written permission therefor. *Delaski v. Northwestern Improvement Co*..... 255

85. SAME—NEGLIGENCE—EVIDENCE—ADMISSIBILITY. Upon an issue as to whether sufficient props were furnished a miner in a coal mine, it is proper to exclude evidence as to trouble in compelling other miners to put up props. *Starck v. Washington Union Coal Co*.. 213

86. MASTER AND SERVANT — NEGLIGENCE — SAFE PLACE — COAL MINE—CONDITIONS—EVIDENCE—ADMISSIBILITY. In an action for injuries

MASTER AND SERVANT—CONTINUED.

sustained in a mine explosion, evidence of a witness as to the condition of the mine three weeks later is admissible, when the witness was the first person to enter the mine after the explosion. *Mrozevich v. Western Steel Corporation*..... 668

37. MASTER AND SERVANT—TOOLS—GUARDING MACHINERY—FACTORY ACT—PRACTICABILITY—EVIDENCE—ADMISSIBILITY. Where the question of practicability is in issue, it is not error to allow the defendant to show by experts that other mills under similar circumstances had found a certain guard for a shingle saw to be impracticable, under Rem. & Bal. Code, § 6587, requiring guards for all machinery which it is practicable to guard. *Shaw v. Woodland Shingle Co*..... 56

38. MASTER AND SERVANT — NEGLIGENCE — SAFE PLACE — EVIDENCE—USUAL CONSTRUCTION. In an action for personal injuries sustained in the fall of a temporary trestle, put up for the purpose of filling up with dirt, and which collapsed during the process of construction because of the removal of stays, it is error to receive evidence as to the usual construction of trestles intended to be used as permanent structures. *Christensen v. Hawley*..... 14

39. SAME—NEGLIGENCE—EVIDENCE—ADMISSIBILITY. In an action for the death of a coal miner, caused by a cave-in after an unsuccessful attempt to draw a pillar, it is not error to admit evidence that pillar drawing is the most dangerous work in the mine, or that it would have been safer to discontinue work at that place for a time. *Cox v. Wilkeson Coal & Coke Co*..... 343

40. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—ADMISSIBILITY—STATEMENT OF OPINIONS. In an action for personal injuries sustained by a city employee in an electric light station, plaintiff's evidence to the effect that he would not have used a passageway had he known that it was dangerous, is not objectionable as the statement of an opinion, but is merely a statement of his ignorance of the dangers and a reaffirmance of his complaint alleging due care. *Haggard v. Seattle*..... 499

41. MASTER AND SERVANT—SAFE PLACE—COAL MINES—VENTILATION—EVIDENCE—SUFFICIENCY. There is sufficient proof of failure to comply with Rem. & Bal. Code, § 7381, requiring sufficient circulation of air in a coal mine, where a battrice for the purpose of deflecting the air into a certain room was torn and defective, and one man therein lost his life and a boy became sick from inhaling poisonous gases. *Delaski v. Northwestern Improvement Co*..... 255

42. MASTER AND SERVANT—INJURIES—INSTRUCTIONS—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY. There is no evidence warranting a verdict for personal injuries sustained by a green hand, a boy seventeen years of age, who was injured by a rip saw while doing his first work, and as claimed by reason of inadequate instructions, where it appears from his testimony that he was instructed in the use of the

MASTER AND SERVANT—CONTINUED.

saw, the operation was simple, and he did not know when or how his hand came in contact with the saw, the accident being a complete mystery to him. *Dahlstrom v. Inland Box and Mfg. Co*..... 325

43. MASTER AND SERVANT—FELLOW SERVANTS—INCOMPETENCY—EVIDENCE—SUFFICIENCY. Incompetency in a common mason or bricklayer is not shown by evidence that he was nervous, and in a hurry about his work, and had on one or two occasions broken or pulled out the line marking the outer edge of the wall. *Cavelin v. Stone & Webster Engineering Corporation*..... 375

44. MASTER AND SERVANT—INJURY TO SERVANT—RAILWAY YARDS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. A dining car conductor is guilty of contributory negligence, precluding any recovery for his death, where it appears that he was familiar with the situation in a passenger yard where trains were constantly moving, and in the nighttime left a well known path between tracks, six feet wide from tie to tie, making a safe space of six feet, and took a walk along the edge of a swamp near the outer ties, where the safe space was only two and one-half feet, and was in consequence struck and killed by a switch engine. *Birrell v. Great Northern R. Co.* 336

45. MASTER AND SERVANT—INJURIES TO SERVANT—WARNING—QUESTION FOR JURY. There is a question for the jury, where a shoveler, struck while working on a street car track, testified that no gong was sounded giving him notice of the approach of a car, while the motorman and another witness testified that the gong was sounded. *Budman v. Seattle Electric Co*..... 281

46. SAME—EVIDENCE—SUFFICIENCY—TRIAL—TAKING CASE FROM JURY. In such a case, the testimony of the foreman to the effect that the barring down of the loose rock was carefully done, does not warrant the court in deciding, as a matter of law, that due care had been exercised; since the foreman is an interested witness and the question is for the jury. *Gibson v. Chicago, Milwaukee & Puget Sound R. Co.* 639

47. MASTER AND SERVANT—SAFE TOOLS—GUARDING MACHINERY—NEGLIGENCE—QUESTION FOR JURY. The negligence of the owner of a ripsaw in failing to guard the lower end of the saw under the table is for the jury, where there was a dispute as to whether it was practical to do so, and whether a sawyer in the discharge of his ordinary duties in cleaning out the chute in the ordinary way was liable to come in contact with it. *Dukette v. Northwestern Woodenware Co.* 95

48. MASTER AND SERVANT—APPLIANCES—GUARDS—FACTORY ACT—EVIDENCE—SUFFICIENCY. Whether it was practicable for the rollers in front of an edger in a sawmill to have been guarded under the factory act is for the jury where it appears that they might have

MASTER AND SERVANT—CONTINUED.

been effectively guarded by a stationary rod across the front of the edger and a dead roller in front of the live roller. *Lepper v. Stetson & Post Lumber Co.* 523

49. SAME—CAUSE OF ACCIDENT—EVIDENCE—QUESTION FOR JURY. Where a man has been forcibly knocked down by a street car, it cannot be said, as a matter of law, that the position in which he was found made it physically impossible that he was struck in any particular way; the question being for the jury. *Budman v. Seattle Electric Co.* 281

50. MASTER AND SERVANT—ASSUMPTION OF RISKS — FACTORY ACT—QUESTION FOR JURY. Under the factory act of 1905, requiring a mill owner to guard machinery where the employee is liable to come in contact with it in the performance of his duty, the defense of assumption of risks does not apply unless the court can say, as a matter of law, that the employee was not in the performance of duty when he came in contact with an unguarded shaft; and this the court cannot do, where there was a conflict in the testimony as to whether an employee injured on an unguarded shaft, had to reach over the shaft in order to clean up and remove sticks from a conveyor chain. *Cook v. Danaher Lumber Co.* 118

51. SAME—QUESTION FOR COURT. Assumption of risks, under the factory act should be withdrawn from the jury, where reasonable minds cannot differ as to the master's failure to comply with the act. *Cook v. Danaher Lumber Co.* 118

52. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The question of contributory negligence of a rip sawyer in adopting an unsafe method of removing waste from a chute, by putting an arm down through the top of the table near the saw, is for the jury, where there was a dispute as to whether an iron rod has been provided for that purpose, and whether such rod could be used advantageously. *Dukette v. Northwestern Woodenware Co.* 95

53. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE — EVIDENCE—QUESTION FOR JURY. One employed to clean up in a mill and keep a conveyor chain clear is not guilty of contributory negligence, as a matter of law, in reaching over a shaft three feet high to clear the chain, where, under his testimony, the shaft was always in motion when he was about it, making his knowledge of the key-seat on the shaft a question for the jury. *Cook v. Danaher Lumber Co.* 118

54. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a tong tender was guilty of contributory negligence in not placing the tongs in the proper position on the log to be moved, is for the jury, when that was a disputed question. *Hall v. Northwest Lumber Co.* 351

55. SAME — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. Whether an operator of an edger was guilty of contributory negligence in oiling the machine while the rollers were in motion, is

MASTER AND SERVANT—CONTINUED.

for the jury, where it appears that he was instructed to do so, that was the customary practice, oiling had to be done frequently, and to stop the rollers would have caused delay. *Lepper v. Stetson & Post Lumber Co*..... 523

56. MASTER AND SERVANT—NEGLIGENCE—COAL MINE—INSTRUCTIONS. The use of the words "any negligence," in an instruction relating to negligence in furnishing props in a coal mine, is not to be construed as relating to any other negligence not mentioned in the pleadings, where from the context the jury could not have been misled. *Starck v. Washington Union Coal Co*..... 213

57. MASTER AND SERVANT—NEGLIGENCE—INSTRUCTIONS. Where twenty-five bents of a trestle fell when pulled on by a team, in raising a bent with a block and tackle, the instructions should not submit the question whether the structure was reasonably safe for the purpose for which it was intended but should submit whether it was strong enough and reasonably safe to hold the pulley on the block and tackle. *Christensen v. Hawley*..... 14

58. MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE—DUTY TO INDEPENDENT CONTRACTOR. Where a defendant's foreman undertook to render a working place in the side of a ledge safe from falling rock, and reported that the same was safe, the defendant is liable to men working there injured by reason of falling rock and reliance on the foreman's assurance, whether they were working as employees of the defendant or as independent contractors on the tunnel. *Gibson v. Chicago, Milwaukee & Puget Sound R. Co*..... 639

MATERIALITY:

Of evidence in civil actions, see EVIDENCE, 2.

MATURITY:

Of note, see BILLS AND NOTES, 4.

MECHANICS' LIENS:

Right of drawee of check with notice to apply payment on other account of contractor, see BILLS AND NOTES, 3.

1. MECHANICS' LIENS—BUILDINGS—WHAT CONSTITUTES—FIXTURES. A structure is of such a permanent and substantial nature as to be lienable for materials used in the "construction and erection of the building," where it appears that the first tenant of a new store building was given consent to and did build a mezzo or balcony floor commencing at the rear of the storeroom, extending about forty feet toward the front, and from side wall to side wall, connected with the lower floor by a stairway, the floor being upon girders supported by uprights, it being impossible to say how the fastening was made to the side walls or the lower floor without a prying

MECHANICS' LIENS—CONTINUED.

apart; although as between landlord and tenant it may have been viewed as a trade fixture. *Stetson & Post Lumber Co. v. Sloane Co.* 180

2. MECHANICS' LIENS — CONTRACT—MODIFICATIONS—EVIDENCE—SUFFICIENCY. The evidence in a mechanics' lien case supports findings to the effect that an agreed length of a building was reduced two feet to avoid having cornices extend over the lot lines, where one of the parties so testified and was corroborated by the circumstances. *Jones v. Nelson*..... 167

3. MECHANICS' LIENS—NOTICE OF CLAIM—AMENDMENT—LIMITATIONS. Upon the trial of an action to foreclose a mechanics' lien, a notice of a lien against the entire premises may be amended to claim a lien against the leasehold interest only of one who was alleged to have an unknown interest or lien upon the property; and it is immaterial that the amendment was made after the time for filing such a lien had expired, amendments being liberally allowed in all cases by Rem. & Bal. Code, §§ 1134, 1147, regardless of such limitations. *Stetson & Post Lumber Co. v. Sloane Co.*..... 180

4. MECHANICS' LIENS—PAYMENT—APPLICATIONS. A materialman receiving a check from a contractor, with notice that it was payment on the building contract, is bound to apply it on the contractor's account for that building, and cannot divert part of the proceeds to other accounts and claim a lien against the building for the balance. *Hughes & Co. v. Flint*..... 460

5. MECHANICS' LIENS—MATERIALMEN—PAYMENT—TENDER. In an action by a materialman to foreclose a mechanics' lien for a balance due from the contractor, a tender by the contractor "in full payment," which includes all that could be charged as a lien against the property, could have been accepted without prejudice, and accordingly relieves the owner from liability, although the tender was insufficient to discharge all claims against the contractor. *Hughes & Co. v. Flint*..... 460

6. MECHANICS' LIENS—FORECLOSURE—PLEADING—VARIANCE. It is not a fatal variance for a mechanics' lien notice to claim a lien for the construction and erection of a building, and to prove an alteration or improvement of a new building by the addition of a mezzo or balcony floor, where the party could not have been actually misled to his prejudice, within Rem. & Bal. Code, § 299, which is applicable to lien cases; especially where the building had never been occupied and the contractor may have taken it to be part of the original plan. *Stetson & Post Lumber Co. v. Sloane Co.*..... 180

7. MECHANICS' LIENS—ATTORNEY'S FEES. It is not an abuse of discretion to deny attorney's fees in an action to foreclose a mechanics' lien, where tender was made of all sums that could be charged against the property. *Hughes & Co. v. Flint*..... 460

MEETINGS:

Of stockholders, see CORPORATIONS, 2.

MERGER:

Of street railway companies as affecting issuance of transfers, see STREET RAILROADS, 11.

METHOD OF WORK:

Duty of servant to adopt safer way, see MASTER AND SERVANT, 28.

MINES AND MINING:

Injuries to employees from employer's violation of statute, see MASTER AND SERVANT, 6-8, 14, 34, 41.

MINORS:

See INFANTS.

MISCONDUCT:

Of trial judge, see CRIMINAL LAW, 12.
Of jury, see CRIMINAL LAW, 11.
Of judge in civil trial, see TRIAL, 1, 2.

MISTAKE:

Cancellation of deed for, see CANCELLATION OF INSTRUMENTS, 2.
Ground for reformation of instrument, see REFORMATION OF INSTRUMENTS.
Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 4.

MODIFICATION:

Costs on appeal on reduction of judgment, see COSTS, 3.
Of building contract, see MECHANICS' LIENS, 2.

MONEY:

Obtaining money under false pretenses, see FALSE PRETENSES.

MONEY PAID:

Parol evidence of overpayment, see EVIDENCE, 7.

MONEY RECEIVED:

Recovery of tax paid, see TAXATION.

MORTGAGES:

Quieting title against mortgage given by stranger to title, see QUIETING TITLE.

1. MORTGAGES — ABSOLUTE DEED AS MORTGAGE — EVIDENCE — SUFFICIENCY. Where property was purchased in the name of a son, and the father built a house and lived on the property, the fact that the deed to the son was not recorded and was kept in the possession of the father until his death is not sufficient to overcome the presump-

MORTGAGES—CONTINUED.

tion that the deed speaks its true intent and was not intended as a mortgage to secure advances made by the son. *Dempsey v. Dempsey* 632

2. MORTGAGES—ABSOLUTE DEED AS MORTGAGE—EVIDENCE. A deed may be shown by parol to have been intended as a mortgage, but the evidence must be clear, cogent, and convincing. *Dempsey v. Dempsey* 632

MOTIVE POWER:

Right to propel cars by cable or electricity, see STREET RAILROADS, 1, 6.

MUNICIPAL CORPORATIONS:

Ordinances impairing obligation of contracts, see CONSTITUTIONAL LAW, 1.

Injunction against canvassing returns of illegal election, see INJUNCTION, 1.

Street railroads in general, see STREET RAILROADS.

Treble damages for cutting trees in street and alley, see TRESPASS.

1. MUNICIPAL CORPORATIONS—CHARTER—ORDINANCES — ENACTMENT—ORDINANCES OBLIGATING CITY FOR PAYMENTS. Under a city charter providing that no ordinance "obligating the city for the payment" of more than a specified sum shall be passed before the second regular meeting of the council after its introduction, an ordinance passed on the day of its introduction is void where it provides for contracts for a water extension, and obligates the city to create a special fund for the benefit of the contract by setting aside fifty per cent of its gross revenues from its water system and obligates the city to pay such special fund to the contractor; "obligating the city," not being limited to the creation of a general indebtedness against the city. *Savage v. Tacoma*..... 1

2. SAME—MANDATORY PROVISIONS. Charter provisions prescribing a definite method for the enactment of ordinances are mandatory. *Savage v. Tacoma*..... 1

3. MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY — ELECTIONS —VALIDITY—POLLING PLACES. Under the general election laws which require the division of a county into election precincts and the designation of one voting place in each precinct, and which make residence within the precinct a necessary qualification of an elector, a city election for the annexation of territory is void where no voting places were designated in several of the precincts; since the electors therein were thereby disfranchised. *Wilton v. Pierce County*... 386

4. MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—INJUNCTION —PERSONS ENTITLED TO SUE. Rem. & Bal. Code, § 4945, providing that no person can contest an election unless he is a qualified elector of the district etc., in which the office is to be exercised, has no ap-

MUNICIPAL CORPORATIONS—CONTINUED.

plication to an action in equity to enjoin the canvass of returns of an illegal city election for the annexation of territory. *Wilton v. Pierce County* 386

5. MUNICIPAL CORPORATIONS—CONTRACTS—BRIDGES—COMMISSIONER OF PUBLIC WORKS—POWERS—AWARDS—BIDS. Under Tacoma city charter, §§ 129, 130, making the commissioner of public works subject to the direction and control of the city council, giving him power to supervise the construction and repair of bridges, but not to contract therefor, and providing that whenever the city council shall so provide by resolution or ordinance, before any contract shall be awarded it shall be submitted to them for approval, an award by the commissioner of a bridge contract upon competitive bids is without force, where the city council by ordinance thereafter, without taking any notice of the commissioner's action, awarded the contract to another bidder; and where § 163 of the charter providing for the awarding of contracts by the commissioner refers only to street work on local assessments and does not apply to bridges built at the expense of the general fund. *Graff v. Tacoma*..... 186

6. SAME — INEQUALITIES — BENEFITS. Inequalities of a local assessment upon lands similarly situated will not avoid the assessment if the record does not show that the differences were arbitrary, or that the property assessed the highest did not receive a greater benefit. *Shryock v. Hannenen*..... 296

7. SAME—SEPARATE STREET EXTENSIONS—ORDINANCE — OBJECTS — DUPLICITY. An ordinance for the condemnation of several strips of land, from one-fourth to one-half a mile apart, for several streets, embraces but a single object and is not void for duplicity, where it appears from the maps that it was all one general plan to create a connected way between two points. *In re South Shilshole Place*.... 246

8. MUNICIPAL CORPORATIONS—IMPROVEMENTS — LOCAL ASSESSMENTS—DESCRIPTION OF LOTS. A local assessment ordinance for street improvements sufficiently describes the lots to be assessed as all the lots and land abutting on the designated portions of the street, to the depth of 120 feet, without giving the block and lot numbers. *Shryock v. Hannenen*..... 296

9. SAME—DAMAGES—GRADES — EVIDENCE — ADMISSIBILITY. In a proceeding to assess the benefits to property by reason of the condemnation of a public street through the tract, in which it appeared that a reasonable grade would require a cut, but no grade had been established, confirmation of the assessment without inquiry into the effect of the grade is error. *In re South Shilshole Place*..... 246

10. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENT FOR BENEFITS—EMINENT DOMAIN—VERDICT OF NO DAMAGES—EFFECT. Where proceedings to condemn land for the purpose of widening a street are conducted separately from a proceeding to regrade the same, a gen-

MUNICIPAL CORPORATIONS—CONTINUED.

eral verdict that the remainder of abutting lots were damaged one dollar by the taking more than they were benefited, and sustained no damage by reason of the regrade, does not exempt the lots from an assessment for benefits for the regrade, the implication being rather that the property would be benefited thereby. *Levy v. Seattle* 540

11. SAME—UNPLATTED LAND. An irregular block not platted into lots, and used for railroad purposes is properly assessed for local improvements as unplatted land. *Shryock v. Hannenen*..... 296

12. MUNICIPAL CORPORATIONS—IMPROVEMENTS — ASSESSMENT OF BENEFITS. An assessment of benefits from the condemnation of land for street extensions through unplatted property should be set aside for manifest abuse of discretion, where the commissioners assessed the unplatted property at about ten times as much as platted property, irrespective of its relation to the streets or the benefits received, arbitrarily assuming that the same was benefited greatly in excess of platted property; and it is an abuse of discretion for the trial judge to select commissioners who will, or influence them to, make such an assessment. *In re Everett*..... 493

13. SAME—IRREGULAR BLOCK. A local assessment for street improvements on abutting property to the depth of 120 feet is properly limited to that portion of an irregular block which is within 120 feet of the street. *Shryock v. Hannenen*..... 296

14. SAME — STREET IMPROVEMENTS — BENEFITS. The eminent domain commissioners are vested with a discretion in determining the benefits from the opening of a street, and the opening of a city street through a tract of unplatted land is presumed to be a special benefit. *In re South Shilshole Place*..... 246

15. SAME—DISTRICTS—PARTIES ENTITLED TO OBJECT. Abutting owners within an assessment district cannot complain that the district improperly included the lands of others not subject to the assessment. *Shryock v. Hannenen*..... 296

16. MUNICIPAL CORPORATIONS — SPECIAL ASSESSMENTS — OBJECTIONS — WAIVER. *Semble*, that parties to a proceeding to condemn land for a city street who fail to object that the ordinance for condemnation was duplicitous cannot raise the objection on appeal from the assessment of damages. *In re South Shilshole Place*..... 246

17. SAME—COSTS AND EXPENSES. Rem. & Bal. Code, § 7787, providing that eminent domain commissioners, in assessing the property benefited, shall include all costs and expenses of the proceedings to the time when the proceeding was referred to them, and probable future costs and expenses, authorizes the inclusion of costs of preparing and serving the condemnation proceeding, and of expert witnesses, engineers' expenses, etc. *In re South Shilshole Place*..... 246

MUNICIPAL CORPORATIONS—CONTINUED.

18. SAME—COSTS. The reasonable cost of preliminary surveys and advertising may be included in a local assessment. *Shryock v. Hanpenen* 296

19. MUNICIPAL CORPORATIONS—IMPROVEMENTS — ASSESSMENTS — BENEFITS TO PUBLIC—REVIEW BY COURTS—POWER—HEARING. Under Rem. & Bal. Code, § 7790, eminent domain commissioners, upon assessing property benefited by a municipal improvement, must determine what proportion, if any, of the total cost will be of benefit to the public, and assess such amount to the city, and the balance to the property; and under Id., §§ 7795, 7796, upon appeal, the superior court may modify the assessment and adjust the assessments between the city and the property owners, and hear evidence thereon. *Spokane v. Gilbert* 361

20. SAME—OBSTRUCTIONS—NEGLIGENCE OF ABUTTING OWNER—LIABILITY OF CITY—NOTICE. A city permitting an abutting owner to obstruct a street in the laying of walks is liable for defects created or negligence as if the city itself had been doing the work, and notice to the city of the defects is not necessary. *Lasityr v. Olympia*..... 651

21. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE OF CONTRACTOR—INJURY TO PEDESTRIAN. It is negligence, warranting a recovery for the loss of an eye by a pedestrian by reason of a cinder, for a contractor on a city street to operate a locomotive without sufficient spark arresters, under a narrow bridge designed for foot passengers. *Coffer v. Erickson*..... 559

22. MUNICIPAL CORPORATIONS — STREETS—OBSTRUCTIONS—NOTICE—CONTRIBUTORY NEGLIGENCE. The contributory negligence of a pedestrian in failing to discover a wire netting about three feet high stretched across a sidewalk, is for the jury, where he fell over the same at night and there was evidence that it could not be seen. *Lasityr v. Olympia* 651

23. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE — INJURY TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE. It is not contributory negligence, as a matter of law, for plaintiff to walk across a narrow foot bridge especially built for foot passengers, under which was a work train the locomotive of which was throwing up sparks and cinders, one of which lodged in plaintiff's eye...*Coffer v. Erickson*..... 559

24. MUNICIPAL CORPORATIONS—TORTS—FLOODING PREMISES — LIABILITY OF CITY. A city is liable for damages resulting from flooding premises by pumping water into a sewer, in an effort to remove an obstruction, knowing at the time that such damage would probably result, and cannot plead that the act was done in a governmental capacity. *Hayes v. Vancouver*..... 536

25. MUNICIPAL CORPORATIONS—PERSONAL INJURIES—NOTICE OF CLAIM—VARIANCE. Under a claim against a city for personal injuries alleg-

MUNICIPAL CORPORATIONS—CONTINUED.

ing that plaintiff was greatly bruised and injured and her whole right side paralyzed, and that she suffered great pain under her kidney, it is permissible to show injuries to the right shoulder and back. *Horton v. Seattle*..... 301

MURDER:

See HOMICIDE.

MUTUALITY:

Contract of guaranty, see GUARANTY.

Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 1, 2.

NAMES:

Filing firm name as condition precedent to capacity to sue, see PARTIES.

NAVIGABLE WATERS:

Operation of draw bridge as damaging private property without compensation, see EMINENT DOMAIN, 2.

Disposal of state tide lands, see PUBLIC LANDS.

NECESSITY:

For claim of title in good faith, see ADVERSE POSSESSION, 1.

Of notice to terminate membership in baseball league, see ASSOCIATIONS.

NEGLIGENCE:

Of carriers in carriage of live stock, see CARRIERS.

Damages in general, see DAMAGES.

Opinion evidence to show negligent construction of trestle, see EVIDENCE, 8.

Allowing fire to spread from engine on right of way, see FIRES.

In use of highway, see HIGHWAYS, 2-5.

Of employers, see MASTER AND SERVANT.

Of fellow servant as defense, see MASTER AND SERVANT, 13, 14.

Risks assumed by servant, see MASTER AND SERVANT, 18-24, 33, 50, 51.

Contributory negligence of servant, see MASTER AND SERVANT, 20, 24-27, 29, 30, 40, 44, 52-55.

Master's liability for negligence of independent contractor in general, see MASTER AND SERVANT, 58.

Of person injured by defects or obstructions in street, see MUNICIPAL CORPORATIONS, 22, 23.

Liability of cities for torts, see MUNICIPAL CORPORATIONS, 20-25.

Of person injured by street car, see STREET RAILROADS, 18.

NEGLIGENCE—CONTINUED.

1. NEGLIGENCE—DANGEROUS PREMISES—TRESPASSERS—LICENSE — REVOCATION—INSTRUCTIONS. In an action for injuries sustained by plaintiff in stepping into a post hole dug by a neighbor preparatory to putting up a fence, in which it was claimed by the defendants that they had revoked plaintiff's license to use a pathway over the land, both by notice and by tying the gate, it is error to refuse to give an instruction based upon defendants' evidence and theory of the case to the effect that there could be no liability to a trespasser, defined as one warned off the land. *West v. Shaw*..... 227

2. NEGLIGENCE—PLEADING AND PROOF—TRIAL. Evidence of negligence not alleged in the complaint, received without objection, will be considered on motion for a nonsuit. *Mrozevich v. Western Steel Corporation* 668

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE:

Ground for new trial, see NEW TRIAL, 5-8.

NEW TRIAL:

Trial *de novo* and issues on appeal to superior court, see APPEAL AND ERROR, 12.

Harmless error in ruling on motion for, see APPEAL AND ERROR, 45.

Decision on appeal as law of the case on new trial, see APPEAL AND ERROR, 46-48.

1. NEW TRIAL—GROUNDS—MISCONDUCT OF JURORS—SHOWING. A new trial should not be granted upon the affidavit of appellant's attorney that articles had been published in a newspaper tending to influence the jury, where he simply stated that he was informed and believed that a majority of the jurors had read the articles, and there was no evidence that the jurors had read them. *Haggard v. Seattle* 499

2. NEW TRIAL—GROUNDS—ERROR OF LAW. A new trial is properly granted where the trial court had committed error of law in granting a nonsuit or in excluding evidence. *Merritt v. Hibbard*... 368

3. NEW TRIAL—GROUNDS—INSUFFICIENCY OF EVIDENCE. A new trial should not be granted on the ground that the verdict is contrary to the evidence merely because the court differed with many of the witnesses as to the extent of the damages. *In re Renton*..... 330

4. NEW TRIAL—GROUNDS—SURPRISE—EVIDENCE. Introduction by defendant of evidence material to the issues disclosed by the pleadings cannot be made the ground of a new trial on the ground of surprise, where the plaintiffs were not misled to believe that no evidence of that nature would be used against them. *Hardman Estate v. McNair* 74

NEW TRIAL—CONTINUED.

5. NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial should not be granted for newly discovered evidence that is merely cumulative and not likely to change the result. *Hardman Estate v. McNair* 74

6. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DISCRETION. The discretion of the trial court in refusing a new trial for newly discovered evidence, based upon affidavits of discredited witnesses, will not be disturbed on appeal. *Anderson v. Woolley*..... 236

7. NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—CRIMINAL LAW. A new trial on the ground of newly discovered evidence is properly overruled where the evidence was cumulative or immaterial, or where it was to impeach the truth and veracity of a witness, witnesses for that purpose having been subpoenaed at the trial and not called for some reason not disclosed; or on the ground that a witness was intoxicated while on the stand, no objection having been made at the time. *State v. Gray*..... 549

8. NEW TRIAL—NEWLY DISCOVERED EVIDENCE — DILIGENCE — DISCRETION. It is not an abuse of discretion to refuse a new trial for newly discovered evidence, where it appears that such evidence was disclosed early in the trial, no continuance was asked, or effort made to learn of the whereabouts of the witness, and from the circumstances the trial judge was warranted in finding that due diligence had not been exercised in the first instance. *Coffer v. Erickson* 559

9. NEW TRIAL—AFFIDAVITS OF JURORS—IMPEACHING VERDICT. Affidavits of jurors in support of a motion for a new trial cannot be received to affect matters that manifestly inhere in the verdict. *Sexsmith v. Brown*..... 164

NONRESIDENCE:

Effect on limitation, see LIMITATION OF ACTIONS, 1.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

Of appeal, see APPEAL AND ERROR, 7.

Necessity for to terminate membership in baseball league, see ASSOCIATIONS.

Of claim for damages to live stock, see CARRIERS, 4.

Duty of driver of automobile to take notice of road, see HIGHWAYS, 6.

To *bona fide* purchaser of community property from wife, see HUSBAND AND WIFE, 1.

Of lien claim, see MECHANICS' LIENS, 3.

Claim for injury from defects or obstructions in street, see MUNICIPAL CORPORATIONS, 25.

To pedestrian of obstruction on sidewalk, see MUNICIPAL CORPORATIONS, 22.

NOTICE—CONTINUED.

To city of defect or obstruction in street, see MUNICIPAL CORPORATIONS, 20.

Affecting *bona fides* of purchaser of land, see VENDOR AND PURCHASER, 7, 8.

Necessity for notice of forfeiture for nonpayment of principal or interest, see VENDOR AND PURCHASER, 6.

NUISANCE:

1. NUISANCE—WHAT CONSTITUTES—SANITARIUM—"COMFORT." A tuberculosis sanitarium maintained in a residential section of the city will be enjoined as a nuisance, where the fear and dread of the disease is such that it depreciates the value of adjacent property to an extent of one-third or one-half, and interferes with the comfortable enjoyment thereof, disturbing the minds, nerves and sleep of the occupants; especially in view of Rem. & Bal. Code, § 8309, defining a nuisance as any act that either annoys or endangers the comfort or repose of others. *Everett v. Paschall*..... 47

2. NUISANCES—WHAT CONSTITUTES—UNDERTAKING ESTABLISHMENTS—RESIDENCE DISTRICT. The maintenance of an undertaking establishment in the residence section of a city, within a few feet of residences, while not a nuisance *per se*, may be enjoined as a nuisance, where it appears that, although maintained with every sanitary precaution, noxious odors and gases will permeate the nearby residences, and that there is danger of infection and contagion; and notwithstanding the fact that the owner intends to occupy the second story of the building as a residence. *Densmore v. Evergreen Camp No. 147, Woodmen of the World*..... 230

OBJECTIONS:

Review as dependent on objection or exception made on trial, see APPEAL AND ERROR, 3-6.

Waiver of objection to capacity to sue for nonpayment of annual license fee, see CORPORATIONS, 6.

To dealings with corporation by stockholders and waiver thereof, see CORPORATIONS, 2.

Waiver of objections to change in interest or ownership of property insured, see INSURANCE, 2.

Waiver of objection to ruling on challenge to juror, see JURY, 6.

Waiver of objections to proceeding to condemn land for improvement, see MUNICIPAL CORPORATIONS, 16.

Waiver of objections for failure to file firm name, see PARTIES.

OBSTRUCTIONS:

Of highways, see HIGHWAYS, 1.

In street or public place causing injury to pedestrian, see MUNICIPAL CORPORATIONS, 20-23.

OCCUPATION:

Of building insured, see INSURANCE.

OFFICERS:

Corporate officers, see CORPORATIONS.

Mandamus to review action of board of medical examiners, see MANDAMUS.

OPINION EVIDENCE:

In civil actions, see EVIDENCE, 8, 9.

Opinion evidence as to guarding shingle saw, see MASTER AND SERVANT, 37.

OPTION:

To declare note due, and time for exercising, see BILLS AND NOTES, 4.

ORAL AGREEMENTS:

See FRAUDS, STATUTE OF.

ORAL EVIDENCE:

See EVIDENCE, 6, 7.

ORDERS:

Review of appealable orders, see APPEAL AND ERROR, 1.

ORDINANCES:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 1, 2, 7, 8.

ORIGINAL PROMISE:

To answer for debt, default or miscarriage of another, see FRAUDS, STATUTE OF, 1.

OWNERSHIP:

Acts of indicating claim of title to vacant land, see ADVERSE POSSESSION, 2.

Change of interest or ownership in property insured, see INSURANCE, 2.

PANEL:

Challenge to jury panel, see JURY, 5.

PARENT AND CHILD:

Civil status of children born of Indian mother, see CITIZENS.

PAROL AGREEMENTS:

Effect and requirements of statute of frauds, see FRAUDS, STATUTE OF.

PAROL EVIDENCE:

See EVIDENCE, 6, 7.
To show deed as mortgage, see MORTGAGES, 2.
To vary written contract of sale, see SALES, 2.

PARTIES:

Entitled to accounting, see ACCOUNT, 2.
Entitled to allege error, see APPEAL AND ERROR, 13.
Service of notice of appeal on parties defendant, see APPEAL AND ERROR, 7.
Corporate capacity to sue, see CORPORATIONS, 6.
Rights and liabilities as to costs, see COSTS.
Entitled to allege error on criminal appeal, see CRIMINAL LAW, 13.
Declarations of person since deceased, see EVIDENCE, 3-5.
Admissions as evidence, see EVIDENCE, 5.
Entitled to object to assessment district, see MUNICIPAL CORPORATIONS, 15.
Entitled to enjoin canvass of illegal city election for annexation of territory, see MUNICIPAL CORPORATIONS, 4.
In trespass, see TRESPASS.
Competency as witnesses, see WITNESSES, 1.

1. PARTIES—CAPACITY TO SUE—FILING NAME OF FIRM—WAIVER OF OBJECTION. The provisions of Rem. & Bal. Code, §§ 8369, 8373, providing for the filing of certificates by persons doing business under an assumed name, before maintaining any action or suit, relates only to the capacity to sue, and are waived unless objection is raised by demurrer. *Pierson v. Northern Pac. R. Co.*..... 450

PAYMENT:

Right of drawee of check with notice to apply payment to other account, see BILLS AND NOTES, 3.
Of interest as foreclosing right to declare note due, see BILLS AND NOTES, 4.
Acceptance of as waiver of right to rescind, see CONTRACTS, 3.
Right to rescind contract for default in payment, see CONTRACTS, 2.
Parol evidence of overpayment, see EVIDENCE, 7.
Claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS.
Tender of payment by contractor as releasing owner from liability, see MECHANICS' LIENS, 5.
Duty of materialman in applying payment received from contractor, see MECHANICS' LIENS, 4.
Taxes paid, see TAXATION.
Price of land sold, see VENDOR AND PURCHASER, 6.

PERFORMANCE:

Performance or breach of contract, see CONTRACTS.

PERSONAL INJURIES:

See NEGLIGENCE.
Inadequate and excessive damages, see DAMAGES, 3-12.
Measure of damages, see DAMAGES, 1.
Evidence of personal, bodily injury causing death, see DEATH.
From explosions, see EXPLOSIVES.
From negligence in use of highway, see HIGHWAYS, 2-5.
To employee, see MASTER AND SERVANT.
From defects or obstructions in street or public place, see MUNICIPAL CORPORATIONS, 20-23, 25.
To persons on or near street railroad tracks, see STREET RAILROADS, 18.

PERSONAL PROPERTY:

Wrongful conversion, see TROVER AND CONVERSION.

PHYSICIANS AND SURGEONS:

Mandamus to review action of board of medical examiners, see MANDAMUS.

1. PHYSICIANS AND SURGEONS—LICENSES—DECISION OF MEDICAL BOARD—APPEAL—REVIEW. Rem. & Bal. Code, § 8399, providing for an appeal to the superior court from the decision of the medical board refusing a physician a license to practice, the court on appeal has a right to administer the provisions of the medical act relating to examinations. *In re Littlefield*..... 150

2. SAME—QUESTIONS OF FACT—TRIAL DE NOVO. An appeal from the decisions of the medical board refusing a physician a license to practice, under Rem. & Bal. Code, § 8399, giving a general right to appeal as in other cases, brings up for review all questions of fact, notwithstanding expert evidence may be required to determine the qualifications of the applicant, in view of the provisions requiring a trial *de novo*, and that the examination papers be a part of the record, and that the case stand for trial as an ordinary civil action. *In re Littlefield*..... 150

3. PHYSICIANS—LICENSE TO PRACTICE—PROCEEDINGS—APPEAL. Appeal lies from the order of the board of medical examiners refusing a license to practice, under Rem. & Bal. Code, § 8399. *State ex rel. Brunn v. State Board of Medical Examiners*..... 623

PLATS:

Description of boundaries, see BOUNDARIES, 2.
Construction of, see DEDICATION.

PLEADING:

Joinder of causes of action, see ACTION.
Appealability of order on motion relating to pleadings, see APPEAL AND ERROR, 1.

PLEADING—CONTINUED.

Presumption as to amendment, see APPEAL AND ERROR, 14.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 26.
Amendment of complaint on appeal from justice court, see CRIMINAL LAW, 1.
In actions for fraud, see FRAUD, 2, 3.
Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.
On insurance policies, see INSURANCE, 2.
For injuries to servant, see MASTER AND SERVANT, 32, 33.
To enforce mechanic's lien, see MECHANICS' LIENS, 7.
Actions for negligence, see NEGLIGENCE, 2.
Mode of objection for defects as to parties, see PARTIES.
For price of goods sold, see SALES, 3.
In suit for specific performance, see SPECIFIC PERFORMANCE.
In action for conversion, see TROVER AND CONVERSION.

1. PLEADING—AMENDMENTS—VARIANCE. It is not error to allow an amendment before trial, increasing the amount claimed on a contract of guaranty, where no surprise was claimed or continuance asked; and no variance results from proof of the increased amount. *Schoening v. Maple Valley Lumber Co*..... 332

2. PLEADING—DEMURRER—WAIVER BY PLEADING OVER. In an action to recover on a sight draft, a demurrer to the complaint, on the ground that an acceptance in writing was not alleged, is waived by pleading over, admitting the execution of the draft and setting up a partial failure of consideration through a mutual mistake. *Clemens v. Stanton Co*..... 419

3. PLEADING—ISSUES AND PROOF—DEMURRER—EFFECT. The sustaining of a demurrer to affirmative defenses does not entitle the plaintiff to judgment on the pleadings where other issues are presented by denials in the answer. *Levy v. Seattle*..... 540

POLICE POWER:

Sale of liquor to Indians, see INDIANS.
To regulate frequency of street car service, see STREET RAILROADS, 5, 14.

POLICY:

Accident insurance policy, see DEATH.
Of insurance, see INSURANCE.

POLLING PLACE:

To determine question of annexation of territory to city, see MUNICIPAL CORPORATIONS, 3.

POOL ROOMS:

Allowing minors in pool rooms, see INFANTS.

PRACTICE:

See APPEAL AND ERROR; CERTIORARI; COSTS; CRIMINAL LAW; JURY; MANDAMUS; NEW TRIAL; PLEADING; TRIAL.

PREFERENCES:

Right to purchase tide or shore land, see PUBLIC LANDS.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 25-45.
Ground for reversal in criminal prosecution, see CRIMINAL LAW, 9, 14, 15.

PRESUMPTIONS:

On appeal, see APPEAL AND ERROR, 14.
As to consideration for limited liability contract, see CARRIERS, 2.
As to control of automobile on highway, see HIGHWAYS, 4.

PRINCIPAL AND AGENT:

See BROKERS.
Rights of holder of draft drawn by agent on principal, see BILLS AND NOTES, 1.
Parol evidence of agreement with agent to modify contract, see SALES, 2.

1. PRINCIPAL AND AGENT—COMPENSATION—EVIDENCE—SUFFICIENCY. In an action for the services of an agent, the defense that the agent was to build bunkers costing $7,000, for the unloading of scows, is not made out where the testimony was vague, the agent could have been discharged at any time, and appears to have been discharged for other reasons. *Hesselgrave v. Ginnett*..... 87

2. PRINCIPAL AND AGENT—THIRD PERSONS — LIABILITY OF AGENT — FRAUD. An agent in the sale of land is liable in damages for fraud whereby he induced the plaintiff to pay him money on the purchase price of the land. *Garrett v. Sparks Brothers*..... 397

PRINCIPAL AND SURETY:

Injunction bond, see INJUNCTION, 2.

1. PRINCIPAL AND SURETY — INDEMNITY — CONTRACT — CONSTRUCTION. While a rule of strict construction applies to sureties and guarantors, a contract of indemnity is subject to the same construction as any other contract in order to ascertain and give effect to the intent of the parties. *Black Masonry & Contracting Co. v. National Surety Co.* 471

2. PRINCIPAL AND SURETY — INDEMNITY — COMPENSATED SURETY — RELEASE—CHANGE IN CONTRACT—PREJUDICE. A compensated indemnity company which gave a bond to secure the performance of a subcontract to furnish stone for a building, is prejudiced by being deprived of its security and by relieving the principal in the bond of the in-

PRINCIPAL AND SURETY—CONTINUED.

ducement to perform his contract, and there is a substantial breach of the contract discharging the surety from liability, where the contract provided for payment to the contractor only when the stone had been placed in the building, and then upon certificate of the architect; and without notice to the surety the contract was changed and payments aggregating $3,500 were made upon a $16,500 contract before they became due and without any architect's certificate; and but for a delay of sixty days by the principal contractor, the principal in the bond could have completed the subcontract for the stone. *Black Masonry & Contracting Co. v. National Surety Co*..... 471

PROCESS:

On appeal, see APPEAL AND ERROR, 7.

PROFITS:

Right of officers and stockholders to profit by dealing with corporations, see CORPORATIONS, 1-4.

PROHIBITION:

Denial of right to drink or sell liquor as invading constitutional right, see CONSTITUTIONAL LAW, 2.

Sale of liquor to Indians of mixed blood, see INDIANS.

PROMISE:

To pay debt of another, see FRAUDS, STATUTE OF, 1.

PROMISSORY NOTES:

See BILLS AND NOTES.

Liability for notes executed by officer, see CORPORATIONS, 5.

PROPERTY:

Adverse possession of, see ADVERSE POSSESSION.

Dedication to public use, see DEDICATION.

Taking for public use, see EMINENT DOMAIN.

Protection of rights of property by injunction, see INJUNCTION, 1.

1. PROPERTY—SUBJECTS OF—LABOR. The right of employment in a laboring man is property. *Jones v. Leslie*..... 107

PROSTITUTION:

Open and notorious lewdness or lascivious conduct, see LEWDNESS.

PROXY:

Voting by proxy, see CORPORATIONS, 3.

PUBLIC IMPROVEMENTS:

By cities, see MUNICIPAL CORPORATIONS, 6-19.

PUBLIC LANDS:

Right of railroad to condemn tide lands, see EMINENT DOMAIN, 2.

1. PUBLIC LANDS—TIDE LANDS—PREFERENCE RIGHT TO PURCHASE—ABUTTERS—HOLDER OF LEGAL TITLE. The statute giving to the owner of uplands the preference right to purchase abutting tide lands from the state for the period of sixty days after the filing of the tide lands plat, has reference to the owner of the legal title to the uplands during the sixty days when the right must be exercised; and confers no rights upon a vendee in possession under a contract of sale with deed in escrow, who did not acquire legal title by full payment of the price and delivery of the deed until nine months after the tide lands plat was filed. *Book v. Thomas*..... 607

2. SAME—CONTRACT OF SALE—RESERVATION—CONSTRUCTION. It will not be inferred that a vendor of uplands retaining legal title, intended to assign his preference right to purchase tide lands prior to parting with his title, by reason of the reservation in his contract of the mutual use of a dock situated on the tide lands; since the reservation shows either that it was thought that the dock was partly on the upland, or that it might pass as an appurtenance unless reserved. *Book v. Thomas*..... 607

3. SAME — TITLE — WHEN PASSES—RELATION—DEEDS—DELIVERY—ESCROW. Where the vendor of uplands under contract of sale executed and placed in escrow a deed, the delivery of the deed cannot be held to relate back to the time of the delivery in escrow, so as to work an assignment of the vendor's preference right to purchase tide lands as owner of the legal title prior to final payment and final delivery of the deed. *Book v. Thomas*..... 607

PUBLIC NUISANCE:

See NUISANCE.

PUBLIC POLICY:

Fixing venue by agreement, see VENUE.

PUBLIC USE:

Dedication of property, see DEDICATION.
Taking property for public use, see EMINENT DOMAIN.

QUALIFICATION:

Of jurors, see JURY, 2-4.

QUESTION FOR JURY:

Reasonable value of board and services, see CONTRACTS, 4.
In action for injury to servant, see MASTER AND SERVANT, 18, 27, 45-55.
Contributory negligence of pedestrian in city street, see MUNICIPAL CORPORATIONS, 22.
Negligence of driver of wagon in crossing car track, see STREET RAILROADS, 18.

QUIET ENJOYMENT:

Covenants for, see COVENANTS.

QUIETING TITLE:

Laches as affecting right to quiet title, see EQUITY.

1. QUIETING TITLE—CLOUD—MORTGAGE BY STRANGER. Under Rem. & Bal. Code, § 809, enlarging equity jurisdiction, an action lies to quiet title against a mortgage given by a stranger to the title. *Pacific Coast Pipe Co. v. Hedican*..... 576

RAILROADS:

Injuries to stock in cars, see CARRIERS.

Negligent setting of fire on right of way, see FIRES.

Injuries to employee, see MASTER AND SERVANT, 22, 44, 46, 58.

Negligent operation of locomotive underneath foot bridge, see MUNICIPAL CORPORATIONS, 21.

Control, operation and regulation of street cars, see STREET RAILROADS, 1-17.

Injuries to persons on or near street railway tracks, see STREET RAILROADS, 18.

RAPE:

1. RAPE—FORCE—INTENT — EVIDENCE — SUFFICIENCY. There is sufficient evidence of an assault with intent to commit rape, without consent, with force sufficient to overcome resistance, where the assault was conceded and the attempt, force and resistance clearly shown by the evidence of the prosecutrix, and by her condition and bruises on her person immediately thereafter, the intent of the accused being for the jury as shown by his acts. *State v. Pilegge*..... 264

2. RAPE—ASSAULT AND INTENT — RESISTANCE — INSTRUCTIONS. In a prosecution for assault with intent to commit rape by force, it is sufficient to instruct the jury that the act must have been by forcibly overcoming the resistance of the prosecutrix, without charging that she must have made all the resistance within her power. *State v. Pilegge* 264

RATIFICATION:

Of broker's acts as between principal and broker, see BROKERS, 2.

Of act of corporate officer or agent, see CORPORATIONS, 5.

Delivery of deed, see DEEDS, 2.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

Adverse possession, see ADVERSE POSSESSION.

Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF, 2, 3.

Trespass on real property, see TRESPASS.

Conveyance, see VENDOR AND PURCHASER.

RECALL:

Of remittitur on appeal, see APPEAL AND ERROR, 49.

RECEIPTS:

Parol evidence varying receipts, see EVIDENCE, 7.

RECEIVERS:

Appealability of decision made in receivership proceedings, see APPEAL AND ERROR, 1.

1. RECEIVERS — TITLE TO PROPERTY — CONDITIONAL SALE — RIGHTS OF VENDOR—CLAIMS. Where an insolvent held property under a conditional sale agreement, the vendor may file a claim for the property with the receiver, and is entitled to have the matter heard in the receivership and the property restored to its possession without beginning an action or obtaining leave of court; and such claim is not a waiver of any rights under the contract. *Sumner Iron Works v. Wolten* 689

RECORDS:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 8-11.

Review of error as depending on presentation of same by record, see CRIMINAL LAW, 12.

As notice to *bona fide* purchaser of community property from wife, see HUSBAND AND WIFE, 1.

As notice affecting *bona fides* of purchase of land, see VENDOR AND PURCHASER, 7.

REFORMATION OF INSTRUMENTS:

1. REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE—EVIDENCE—SUFFICIENCY. While a deed will not be reformed upon the ground of mutual mistake in the description unless the evidence is clear, the courts will take into consideration any and all facts showing the real intention of the parties; and a deed of a lot will be reformed so as to exclude any portion of an abutting street, then in possession of the vendor, the vacation of which was pending, where such was the intent, as shown by the evidence and the fact that the vendor by agreement removed a building from the lot sold across the line onto the disputed property. *Campbell v. Glazier* 520

REGULATION:

Of street car service, see STREET RAILROADS.

REINSTATEMENT:

Of membership in baseball league, see ASSOCIATIONS, 4.

RELEASE:

Liability as surety, see PRINCIPAL AND SURETY, 2.

REMAND:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 48, 49.

REMOVAL:

Of building erected by tenant upon sale of premises, see LANDLORD AND TENANT, 2.

RENT:

See LANDLORD AND TENANT, 3.

REPEAL:

Of by-law providing for termination of membership in baseball league, see ASSOCIATIONS.

REPRESENTATIONS:

Representation of corporations by officers or agents, see CORPORATIONS, 5.

False representations, see FRAUD; SALES, 1.

REQUESTS:

For instructions in civil actions, see TRIAL, 6, 7.

RESCISSION:

Of contract, see CONTRACTS, 2.

Of contract for sale of goods, see SALES, 1, 2.

Of contract for sale of land, see VENDOR AND PURCHASER, 4, 5.

RESERVATION:

In contract of sale as evidencing intent to assign preference right to purchase tide lands, see PUBLIC LANDS, 2.

RES GESTAE:

In criminal prosecutions, see CRIMINAL LAW, 5.

In civil actions, see EVIDENCE, 3.

RESISTANCE:

Of prosecutrix, see RAPE.

RES JUDICATA:

See JUDGMENT.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 46-48.

RESTITUTION:

Admissibility of evidence to show, see FALSE PRETENSES.

Duty to take back property converted, see TROVER AND CONVERSION.

RESULTING TRUSTS:

See TRUSTS, 1.

REVENUE:

See TAXATION.

REVIEW:

By higher court on appeal for errors or irregularities, see APPEAL AND ERROR.

Statutory writ of review, see CERTIORARI.

In criminal prosecution, see CRIMINAL LAW, 1, 12-15.

Of decision of medical board refusing license to practice, see PHYSICIANS AND SURGEONS.

Of acts or decisions respecting regulation or operation of street car service, see STREET RAILROADS, 6-10.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 18-24, 33, 50, 51.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 3-6, 8, 9, 20-22.

SALE IN GROSS:

See VENDOR AND PURCHASER, 3.

SALES:

Of real property by agent, see BROKERS.

Purchase of property by stockholders and sale to corporation at profit, see CORPORATIONS, 1-4.

Reliance on false representations inducing sale, see FRAUD, 1-4.

To satisfy statute of frauds, see FRAUDS, STATUTE OF, 2, 3.

Of liquor to Indians, see INDIANS.

Of intoxicating liquors, see INTOXICATING LIQUORS.

Rights of vendor of property held by insolvent under conditional sale, see RECEIVERS.

Sale of property held under conditional sale as conversion, see TROVER AND CONVERSION.

Of real property, see VENDOR AND PURCHASER.

1. SALES—RESCISSION BY VENDEE—FRAUD—LACHES—EVIDENCE—SUFFICIENCY. An action to rescind a sale of a reporting business, for false representations as to the income of the business, is properly dismissed, where it appears that the vendee had ample opportunity to make, and did make, a full investigation as to the truth of the representations, and inspected the books, making no objections to the sale for over a month after taking up the business, and the parties were dealing at arm's length. *Margetts v. Lindsey*... 321

2. SALES—DEFENSES—RESCISSION BY VENDEE—WRITTEN CONTRACTS—VARYING BY PAROL—PRINCIPAL AND AGENT—AUTHORITY OF AGENT. Upon a sale by agents of a harvester under a written contract providing that the purchaser was not to countermand the order except for failure of crops, and that all stipulations entered into are all

SALES—CONTINUED.

embodied in the contract and that no agent has any power to make additions or vary the terms, it is not competent for the purchaser to set up a contemporaneous agreement with the agents to the effect that the contract of sale was not delivered or to become effective for one month, and that the owner could, and did, cancel the same within such time; since the written contract could not be contradicted by parol. *Holt Mfg. Co. v. Odenrider*..... 555

3. SALES — DEFENSES — CANCELLATION — COUNTERMAND OF ORDER — PLEADING—ISSUES AND PROOF. In an action for the price of a harvester sold by agents, an affirmative defense of a contemporaneous oral agreement, contradicting the writing, to the effect that the contract was not to be effective for one month and that pursuant thereto it was cancelled by the purchaser, does not admit of proof, over defendant's objection, that the written contract was cancelled by mutual consent. *Holt Mfg. Co. v. Odenrider*..... 555

4. SALES—CONTRACTS—EVIDENCE—ADMISSIBILITY. Upon an issue as to the price of logs fixed by the contract of sale, evidence of the market value at the time of sale, and the cost of towing, delivery, etc., is admissible as tending to show the reasonableness and probability of the several contentions of the parties; but evidence of the price paid on a specific sale a few days before is inadmissible. *Gronning v. Elliott Bay Mill & Lumber Co*..... 676

5. SAME. Upon a contract to pay for logs certain prices for specified grades, entered into before the logs had been inspected, evidence of the quality or grade of the logs is inadmissible to show the improbability of the contract. *Gronning v. Elliott Bay Mill & Lumber Co.* 676

SANITARIUM:

Maintenance of as nuisance, see NUISANCE, 1.

SECOND APPEAL:

See APPEAL AND ERROR, 46, 47.

SELF-DEFENSE:

Harmless error in instructions on, see CRIMINAL LAW, 14.

SELF-SERVING DECLARATIONS:

See EVIDENCE, 4.

SERVANTS:

See MASTER AND SERVANT.

SERVICE:

Drawing of jury and time for service, see JURY, 5.

Regulating frequency of street car service, see STREET RAILROADS, 2, 3, 7, 8, 10, 12-17.

SIGNALS:

Duty to give signal of starting machinery or appliance, see MASTER AND SERVANT, 3.

SODOMY:

Evidence of similar crimes, see CRIMINAL LAW, 5.

SPECIFIC PERFORMANCE:

Dismissal of action to enforce contract as *res judicata*, see JUDGMENT, 2.

1. SPECIFIC PERFORMANCE — DEFENSES — FRAUD — PLEADINGS. In an action for specific performance, fraud is an affirmative defense to be specially pleaded. *Watkins v. Davison*..... 662

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 9-11.

STATES:

Sale of public lands, see PUBLIC LANDS.

STATUTES:

See FRAUDS, STATUTE OF.

Creation of commercial waterway district as denial of due process of law, see CONSTITUTIONAL LAW, 3.

Laws impairing obligation of contracts, see CONSTITUTIONAL LAW, 1.

Granting special privileges or immunities, see CONSTITUTIONAL LAW, 2.

Dissolution of corporation, see CORPORATIONS, 7, 8.

Construing statutes of eminent domain, see EMINENT DOMAIN, 1.

Construction of statute making offense to allow minors in pool room where liquor is sold, see INFANTS.

Control of liquor traffic, see INTOXICATING LIQUORS.

Statutes of limitation, see LIMITATION OF ACTIONS.

Violation of statute requiring safe place to work in coal mine, see MASTER AND SERVANT, 6, 7, 41.

City ordinances, see MUNICIPAL CORPORATIONS, 1, 2.

STIPULATIONS:

Agreement fixing venue of action, see VENUE.

STOCK:

Injury to live stock during shipment, see CARRIERS.

Corporate stock, see CORPORATIONS, 2, 5-8.

STOCKHOLDERS:

Dealings with corporation, see CORPORATIONS, 1-4.

STREET RAILROADS:

Ordinance regulating service as impairing obligation of contract, see CONSTITUTIONAL LAW, 1.

Injuries to employees, see MASTER AND SERVANT, 26, 45, 49.

1. STREET RAILROADS—FRANCHISES—RIGHTS—MOTIVE POWER. A franchise for various street car routes authorizing the company to propel their cars either by electricity or cable, empowers the company to make a change and employ both on a single route, especially where that has been the contemporaneous construction of the city council. *McGilvra v. Seattle Electric Co*..... 38

2. SAME—FRANCHISE—SERVICE—SUFFICIENCY. A street railway franchise providing that the city council might require the cars to be run "sufficient round trips each day," must be construed with reference to the convenience of the public and the increase of population. *Tacoma v. Boutelle*..... 434

3. SAME — FRANCHISE — CONSTRUCTION — SERVICE. A provision in a street railway franchise requiring cars to run two round trips a day is an expression of the minimum service demanded of the then city, and not of an intention to not require more trips when the growth of the city requires it. *Tacoma v. Boutelle*..... 434

4. SAME—FRANCHISES—CONSTRUCTION. A clause in a franchise expressly restricted to existing street railways that may be acquired and used as a part of the system has no application to any part of the old system. *McGilvra v. Seattle Electric Co*..... 38

5. STREET RAILROADS—FRANCHISES. A city may not, in granting a franchise to a street railway company, divest itself of its governmental police power the exercise of which is necessary for the public welfare or safety. *Tacoma v. Boutelle*..... 434

6. SAME—OPERATION—MOTIVE POWER—CONTROL — REVIEW BY COURTS. The expediency and propriety of allowing a change of motive power on a street car route, thereby preventing continuous passage and requiring transfers, is for the determination of the board of public works, and the courts will not interfere with the deliberate judgment except for abuse of discretion. *McGilvra v. Seattle Electric Co.*..... 38

7. SAME—OBJECTIONS TO CHANGE. Objection to a change of motive power on a street car route on the ground that the service will be inefficient is unavailing, since the authorities can compel an efficient service. *McGilvra v. Seattle Electric Co*..... 38

8. SAME — SERVICE — DETERMINATION OF SUFFICIENCY — LEGISLATIVE QUESTION. Where a street railway franchise provides that the city council might require the cars to be run "sufficient round trips each day" the determination of what is sufficient is a legislative question, subject to review by the courts as to the authority for and reasonableness of the act. *Tacoma v. Boutelle*..... 434

STREET RAILROADS—CONTINUED.

9. SAME—CONTROL—REVIEW BY COURTS—INJUNCTION. Where the determination of engineering problems respecting a street railway route has been vested in and decided by a board of public works, the courts will not, upon conflicting evidence by affidavits, interfere by injunction to set aside the decision. *McGilvra v. Seattle Electric Co.* 38

10. SAME—SERVICE—CHANGE IN ROUTES—TRANSFERS. Where a street car franchise requires the issuance of transfers from one line to another, the matter is within the control of the city, and the courts will not interfere with proposed changes in routes and service in anticipation of a breach of the contract of the company respecting transfers. *McGilvra v. Seattle Electric Co*..... 38

11. STREET RAILWAYS—FRANCHISES—TRANSFERS—CORPORATIONS—MERGER. A street railway company's franchise, which compelled the granting of transfers over all lines controlled by it, cannot be invoked to compel the granting of transfers over the line of a competing traction company (also required to give transfers to any other line giving transfers to it) a majority of the capital stock of which had been acquired by a corporation owning the capital stock of the street railway company, although through such control or merger the officers of the street railway were elected officers of the traction company and managed its affairs, the latter's shops and offices were closed, and physical connection was made between the lines; since each corporation continued to exist as distinct entities having contract rights, regardless of the majority holding of their capital stock. *State ex rel. Tacoma v. Tacoma R. and Power Co*..... 507

12. SAME—SERVICE—TRANSFERS — CONTINUOUS PASSAGE — CHANGE. A street car company may, with the approval of the city, change from a through service to a transfer service, although it may cause some inconvenience. *McGilvra v. Seattle Electric Co*..... 38

13. STREET RAILROADS—REGULATION—REASONABLENESS—VALIDITY. An ordinance regulating the frequency of street car service, and providing that every person violating the same shall be fined, is not void or oppressive as applied to a street car superintendent, where it is admitted that he was in charge of the running and operation of the street car system, there being nothing to show that the service required was unreasonable, and the penalty fixed being a fine not exceeding one hundred dollars. *Tacoma v. Boutelle*..... 434

14. STREET RAILROADS—REGULATION OF SERVICE—POLICE POWER. Police power to regulate the frequency of street car service is conferred upon a city by Const., art. 11, § 11, providing that a city may enforce police regulations not in conflict with general law, and Rem. & Bal. Code, § 7507, subd. 9, authorizing the city to control its streets and regulate the operation of street railroads, and Id., subd. 36, granting it the right to provide for the punishment of practices

STREET RAILROADS—CONTINUED.

dangerous to the public safety and to make necessary regulations for public health, peace and order, and punish persons violating any of the ordinances. *Tacoma v. Boutelle*..... 434

15. SAME—REASONABLENESS. There is nothing inherent in an ordinance requiring a ten and five minute street car service during certain hours which would authorize a court to hold it unreasonable as a matter of law. *Tacoma v. Boutelle*..... 434

16. STREET RAILROADS—REGULATION—SERVICE—REASONABLENESS. An ordinance providing the frequency of street car service does not change or destroy any specific or implied right granted in the company's franchise merely because it is more specific than the general power therefor which was reserved in the initiating ordinances. *Tacoma v. Boutelle*..... 434

17. SAME—BURDEN OF PROOF. The burden of establishing that the regulation of the frequency of street car service was so unreasonable as to be confiscatory is upon those asserting it. *Tacoma v. Boutelle* 434

18. STREET RAILROADS—COLLISIONS—CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The driver of an express wagon is not guilty of contributory negligence, as a matter of law, in attempting to cross a street car track at a street crossing in front of a car from 100 feet to a block away, approaching a crossing where all cars come to a full stop, he having the right to assume that the car was under control. *Nappli v. Seattle, Renton & Southern R. Co*..... 171

STREETS:

See MUNICIPAL CORPORATIONS.

Injury to traveler on county road, see HIGHWAYS.

Grant of rights in street and roads to street railways, see STREET RAILROADS, 1-17.

Treble damages for cutting trees in abutting street, see TRESPASS.

SUPPORT:

Construction of contract for support and maintenance, see CONTRACTS, 1.

SURPRISE:

See NEW TRIAL, 4.

SUSPENSION:

Of policy for breach of conditions, see INSURANCE, 8.

TAXATION:

Annual corporation tax, see CORPORATIONS, 6-9.

Liquor licenses, see INTOXICATING LIQUORS.

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 6-19.

TAXATION—CONTINUED.

1. TAXATION—LIEN FOR TAXES PAID. When taxes are paid in good faith to protect the property from seizure, and inure to the benefit of the owner, a lien for repayment of the taxes is imposed on the premises. *Dalgardno v. Trumbull*..... 659

TAXPAYER:

Requiring juror to be taxpayer, see JURY, 2-4.

TENANCY IN COMMON:

Of community property by operation of law, see HUSBAND AND WIFE, 3.

TENDER:

Of payment by contractor as releasing owner from liability, see MECHANICS' LIENS, 5.

TERMINATION:

Of membership in baseball league, see ASSOCIATIONS.

THEORY OF CASE:

Duty to instruct as to defendant's theory of case, see NEGLIGENCE, 1.

THREATS:

Confessions procured by threats, see CRIMINAL LAW, 8.

TIDE LANDS:

Obstructing wharf by operation of drawbridge as taking private property without compensation, see EMINENT DOMAIN, 2.
Disposal of state tide or shore lands, see PUBLIC LANDS.

TIME:

For taking exceptions, see APPEAL AND ERROR, 4.
For filing case or statement of facts on appeal, see APPEAL AND ERROR, 10, 11.
Maturity of bill or note, see BILLS AND NOTES, 4.
For exercising option to declare note due, see BILLS AND NOTES, 4.
Of commission of burglary, see BURGLARY.
As of essence of contract, see CONTRACTS, 2.
For entry of judgment on award in condemnation proceedings, see EMINENT DOMAIN, 3.
Effect of lapse of time on right to equitable relief, see EQUITY.
Drawing jury and time of service, see JURY, 5.
Amendment of notice of lien, see MECHANICS' LIENS, 3.

TITLE:

Color of title, see ADVERSE POSSESSION.
Quieting title, see EQUITY.
To exercise preference right to purchase tide lands, see PUBLIC LANDS, 1.
Removal of cloud, see QUIETING TITLE.
Of receivers, see RECEIVERS.
To support action of trespass, see TRESPASS.

TOLLING:

Of statute by absence from state, see LIMITATION OF ACTIONS, 1.

TORTS:

See FRAUD; NEGLIGENCE; NUISANCE; TRESPASS; TROVER AND CONVERSION.
Assignability of right of action for tort, see ASSIGNMENTS.
Damages, inadequate or excessive, see DAMAGES, 3-12.
Measure of damages, see DAMAGES, 1.
Injuries from explosives, see EXPLOSIVES.
Negligence in use of highway, see HIGHWAYS, 2-5.
Injuries by employers, see MASTER AND SERVANT.
Of cities, see MUNICIPAL CORPORATIONS, 20-25.
Injuries caused by operation of street cars, see STREET RAILROADS, 18.

TOWNS:

Licensing sale of liquor upon incorporation of town in dry territory, see INTOXICATING LIQUORS, 2.

TRANSFERS:

Over street railway lines, see STREET RAILROADS, 10-12.

TREBLE DAMAGES:

For trespass, see TRESPASS.

TRESPASS:

Care required as to trespassers, see NEGLIGENCE, 1.

1. TRESPASS — CUTTING TREES — TREBLE DAMAGES — MUNICIPAL CORPORATIONS—STREETS—OWNERSHIP OF FEE. Rem. & Bal. Code, § 939, giving treble damages for the cutting of any trees upon any city lot or upon any highway in front of the same, the owner of city lots may recover treble damages for the cutting of trees in an abutting street and alley, whether as owner of the lots or as owner of the fee in the street; since the fee to the street rests in the owner of the abutting property. *Simons v. Wilson*..... 574

TRIAL:

Review of ruling as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 3-6.
Review of ruling as dependent on presentation of same by record, see APPEAL AND ERROR, 8-11.

TRIAL—CONTINUED.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 25-45.
Review of findings in trial by court, see APPEAL AND ERROR, 19-24.
Necessity for including findings in transcript, see APPEAL AND ERROR, 8.
Presumptions on appeal or writ of error, see APPEAL AND ERROR, 14.
Continuance in civil actions, see CONTINUANCE.
In criminal prosecutions, see CRIMINAL LAW.
Right to trial by jury, see JURY, 1, 2.
Summoning and impaneling jury, see JURY, 5.
Competency of and challenge to jurors, see JURY, 6.
Instructions in actions against master for injuries to servant, see MASTER AND SERVANT, 11, 25, 28, 30, 56, 57.
Instructions in action for negligence, see NEGLIGENCE, 1.
Motions and grounds for new trial, see NEW TRIAL.
Misconduct of jury as ground for new trial, see NEW TRIAL, 1.
Trial *de novo* on appeal from decision of medical board refusing license to practice, see PHYSICIANS AND SURGEONS.
Amendment of pleading before trial, see PLEADING, 1.
Instructions in criminal prosecution, see RAPE.
Attendance and examination of witnesses, see WITNESSES.

1. TRIAL—MISCONDUCT OF JUDGE. Remarks of the trial judge during the course of the trial are not ground for reversal, where they could not have been prejudicial. *Hall v. Northwest Lumber Co*..... 351

2. TRIAL—MISCONDUCT OF JUDGE—COMMENT ON EVIDENCE. Remarks of the trial judge as to the youth of a boy thirteen years of age, made to counsel as reasons for overruling objections to leading questions, are not objectionable as comment on the evidence. *State v. McDowell* 398

3. TRIAL—PERSONAL INJURIES—EXHIBITION OF PERSON—EVIDENCE. An indecent exposure of the person of plaintiff in a personal injury case, calculated to arouse the prejudices of the jury, is not ground for reversal if within the *res gestae* of the case. *Cook v. Danaher Lumber Co.* 118

4. TRIAL—INSTRUCTIONS. The words, "now, coming to the other branch of the case," in an instruction are merely introductory and not objectionable as indicating that the other defenses were immaterial. *Silver v. London Assurance Corporation*..... 593

5. TRIAL—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE. It is not prejudicial error to define the "fair preponderance" of the evidence to be such as produces conviction in the mind, where the court qualified the same by adding, "not the number of witnesses, but the most credible evidence; that which satisfies the minds, the minds as jurors." *Shaw v. Woodland Shingle Co*..... 56

TRIAL—CONTINUED.

6. TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse an instruction sufficiently covered in the general charge. *Merrill v. Stevens & Co*..... 28

7. TRIAL—INSTRUCTIONS—REQUESTS. It is not necessary that instructions be given in the language requested, where the same were fairly presented. *Hall v. Northwest Lumber Co*..... 351

8. TRIAL—LAW OF CASE—INSTRUCTIONS. Instructions not excepted to become the law of the case. *Sexsmith v. Brown*..... 164

9. TRIAL—VERDICTS—SPECIAL VERDICTS—INCONSISTENCY. In an action for injuries sustained through the fright of plaintiff's horse on the approach of an automobile, a general verdict is not inconsistent with special findings in that the latter did not determine the specific cause of the horse's fright; it being immaterial whether the noise, excessive speed, or sudden appearance was the cause. *Brown v. Thorne* 18

TROVER AND CONVERSION:

Right of spouse to recover for after divorce as tenant in common, see HUSBAND AND WIFE, 4.

1. TROVER AND CONVERSION—WHAT CONSTITUTES—CONDITIONAL SALES. An attempted sale by one holding property under a conditional sale contract, without the consent of the owner, the changing of possession, and the use of the property by the assigns without paying up or acquiring title, is a conversion as against the owner and original vendor. *Fidalgo Island Shingle Co. v. Brown*..... 516

2. SAME—PLEADING—COMPLAINT—SUFFICIENCY. A complaint in conversion states a cause of action when it alleges title to the property in the plaintiff, its wrongful taking without consent, demand for payment and refusal, and use, damage and destruction by the defendants. *Fidalgo Island Shingle Co. v. Brown*..... 516

3. SAME—DEFENSES—RETURN OF PROPERTY. Upon the conversion of property, the owner may treat it as such and is not required to take back the property, whatever its condition. *Fidalgo Island Shingle Co. v. Brown*..... 516

TRUSTS:

Accounting by trustee, see ACCOUNT, 2.

Purchase by trustee of claims against estate, see EXECUTORS AND ADMINISTRATORS.

1. TRUSTS—RESULTING TRUSTS—EVIDENCE—SUFFICIENCY. The evidence establishes a trust in lands purchased, where the more reliable and preponderance of the testimony shows that the plaintiffs and defendant agreed to buy the land in equal shares, one of the plaintiffs paid the $500 earnest money, and the contract was taken in the name of the defendant, who almost immediately thereafter

TRUSTS—CONTINUED.

repudiated the contract, claiming that the money was a loan to him, it appearing that the parties were related and intimately acquainted, and that defendant's testimony is lacking in candor. *Mayer v. Jacob* 291

2. TRUSTS—TRUSTEE'S COMPENSATION. Upon an accounting of a trust, the trustee being a selling agent of real property, it is proper to allow him compensation only up to the time when he turned over the selling agency to real estate brokers. *Feighan v. Reeves* 465

UNDERTAKERS:

Maintenance of undertaking establishment as nuisance, see NUISANCE, 2.

VACANCY:

Of building insured, see INSURANCE.

VACATION:

Of sale to wife of trustee, see EXECUTORS AND ADMINISTRATORS.

VALUE:

Liability for value of broker's services on sale by owner, see BROKERS, 3.
Of board and services as question for jury, see CONTRACTS, 4.
Evidence of value in action for fraud, see FRAUD, 4.
Pleading value in action for fraud, see FRAUD, 3.

VARIANCE:

In action to enforce mechanics' lien, see MECHANICS' LIENS, 6.
Between claim of injury and proof, see MUNICIPAL CORPORATIONS, 25.

VENDOR AND PURCHASER:

Sale of land by agent, see BROKERS.
Parol evidence to vary contract of sale, see EVIDENCE, 6.
Purchase by trustee of claims against estate, see EXECUTORS AND ADMINISTRATORS.
Fraud inducing sale of land, see FRAUD, 1-4.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2, 3.
Sale of community property, see HUSBAND AND WIFE, 1.
Rights of tenant on sale of premises by lessor, see LANDLORD AND TENANT, 2.
Liability of agent for fraud in sale of land, see PRINCIPAL AND AGENT, 2.
Rights of vendee in possession under contract of sale to preference right to purchase tide lands, see PUBLIC LANDS.
Reformation of deed for mistake in description, see REFORMATION OF INSTRUMENTS.
Transfers of ownership of personal property, see SALES.

VENDOR AND PURCHASER—CONTINUED.

Trusts resulting in favor of party advancing money, see TRUSTS, 1.
Sale of trust property by trustee, see TRUSTS, 2.

1. VENDOR AND PURCHASER—CONTRACTS—DEFINITENESS—MUTUALITY. An agreement by a vendor not to declare a forfeiture of a land contract for five years, if the vendee would plant and cultivate an orchard and remain on the land, and if the land was not then paid for to take pay in fruit growing thereon, is void for indefiniteness and lack of mutuality, the vendee being under no obligation to remain on the land or to pay for it at any definite time. *Spokane Canal Co. v. Coffman* 357

2. VENDOR AND PURCHASER—CONTRACT—MUTUALITY. A receipt, containing the terms of a contract to purchase land, made to one as agent, the principal being undisclosed, and accepted in writing by the owner, is not a mere option or objectionable for lack of mutuality, where the principal made the preliminary payment of $50, tendered timely payment and performance, and was at all times ready to perform, promptly commencing action for specific performance. *Watkins v. Davison*..... 662

3. VENDOR AND PURCHASER—CONTRACT—SALE IN GROSS—ACREAGE—DEFICIENCY. A contract to convey certain legal subdivisions of land "containing 399 1-3 acres" the purchaser agreeing to pay "at the rate of $27.50 per acre, a sum in total of eleven thousand dollars," is a sale in gross, and the vendee is not entitled to a deduction in the price on a survey showing a deficiency of 31 acres, where it appears that the parties contracted in good faith, neither knew the exact acreage, and the land was not the only subject of the contract, some personal property and a lease of other lands being included. *Hyde v. Phillips* 314

4. VENDOR AND PURCHASER—RESCISSION BY VENDOR—MISTAKE. Ignorance on the part of the vendor of residence lots of the fact that the vendee was a negro, is not such a mistake of fact as will excuse the vendor from performance of the contract or authorize a rescission, although the sale will depreciate the value of his property and he would not have made the same if he had known the fact; there having been no concealment or fraud. *Cole v. Hunter Tract Improvement Co.* 365

5. VENDOR AND PURCHASER—RESCISSION BY VENDOR—FRAUD—EVIDENCE—SUFFICIENCY. No fraud is shown, warranting a vendor in refusing to complete a sale, where it appears that she had listed the property with her selling agent, that a contract to purchase was made with the agent, signing as such, for an undisclosed principal, and accepted in writing by the vendor, with a preliminary payment of $50, that the vendor at the agent's request cured defects in the title, and never offered to return the money received, that no fraud, or improper or inconsistent action by the agent was shown, and

VENDOR AND PURCHASER—CONTINUED.

the vendee tendered timely payment and performance; especially where the vendor, in an action for specific performance, did not plead fraud as a defense. *Watkins v. Davison*..... 662

6. VENDOR AND PURCHASER—CONTRACT—NONPAYMENT—FORFEITURE—WAIVER. Where a vendor lived near the land and knew of improvements being made, and took no steps to obtain any payment of principal or interest upon the contract for over three years, equity will not enforce the right of forfeiture until demand is made for payment or reasonable notice is given; and there is no such notice, either by demand for interest, or by notice of forfeiture given to the original vendee, after knowledge that he had assigned the contract to a company, then in possession and managed by another, to whom waiver of forfeiture had been given. *Walker v. McMurchie* 489

7. VENDOR AND PURCHASER—BONA FIDES—CONSTRUCTIVE NOTICE—POSSESSION. A purchaser of timber lands has sufficient notice of a prior unrecorded deed of the timber to put him on inquiry, where he had knowledge that the purchaser of the timber had constructed a logging camp, houses, etc., and a skid road on the land and had cut nearly a million feet of logs then lying on the ground. *Maughlin Mill Co. v. Hamilton*..... 66

8. VENDOR AND PURCHASER—BONA FIDE PURCHASER. One taking a deed of land with notice that the grantor had no equitable interest therein, paying no present consideration, is not an innocent purchaser for value. *Thompson-Spencer Co. v. Thompson*..... 547

VENTILATION:

Defective system in coal mine, see MASTER AND SERVANT, 8, 41.

VENUE:

Review of order for change of, see CERTIORARI.

1. VENUE—FIXING BY AGREEMENT—VALIDITY—PUBLIC POLICY. An agreement in a note that the venue of any action thereon shall be in a particular county, is not void as against public policy, in view of Rem. & Bal. Code, § 216, permitting parties to stipulate that the action may be tried in any county in the state, and §§ 207-209, whereby the court is given jurisdiction regardless of where the action is commenced, and whereby the right to a change to the proper county is waived if not raised at the proper time. *State ex rel. Schwabacher Brothers & Co. v. Superior Court*..... 681

VERDICT:

Review on appeal or writ of error, see APPEAL AND ERROR, 15-18.
Inadequate or excessive verdict, see DAMAGES, 3-12.
Irregularities or defects ground for new trial, see NEW TRIAL, 3.
In civil actions, see TRIAL, 9.

VICE PRINCIPALS:

Acts of foremen and others in authority, see MASTER AND SERVANT, 2, 3, 15, 16, 21, 22, 58.

VIEW:

By jury, see CRIMINAL LAW, 11.

VOTERS:

Voting by proxy, see CORPORATIONS, 3.

WAIVER:

See ESTOPPEL.
Of right to rescind contract, see CONTRACTS, 3.
To object to dealings with corporation by stockholders, see CORPORATIONS, 2.
Of objection to capacity to sue for nonpayment of annual license fee, see CORPORATIONS, 6.
Of right to object to regularity of administrator's sale, see EXECUTORS AND ADMINISTRATORS.
Of damages in right of way deed as defense to action for loss by fire, see FIRES.
To urge stipulation avoiding policy, see INSURANCE, 2.
Of error in denying challenge to juror, see JURY, 6.
Of objections to condemnation proceeding for public improvement, see MUNICIPAL CORPORATIONS, 16.
Of objection for failure to file firm name, see PARTIES.
Of demurrer, see PLEADING, 2.
Filing claim for property in hands of receiver as waiver of rights under conditional sale agreement, see RECEIVERS.
Of provisions in contract for sale of land, for payment, see VENDOR AND PURCHASER, 6.

WARNING:

Evidence of custom in giving warning of blast, see EXPLOSIVES, 2.
Instructing servant as to danger, see MASTER AND SERVANT, 3, 12, 26, 30, 42, 45.

WARRANTY:

Condition of premises for use of lessee, see LANDLORD AND TENANT, 3.

WATERS AND WATER COURSES:

Statute providing for creation of commercial waterway district as denial of due process of law, see CONSTITUTIONAL LAW, 3.
Liability of city for damage from flooding premises, see MUNICIPAL CORPORATIONS, 24.

WITNESSES:

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 30, 31.
Denial of continuance to secure witnesses, see CONTINUANCE.
Claiming mileage for in cost bill, see COSTS, 1.
Indorsement of witnesses on information, see CRIMINAL LAW, 9.
Opinions, see EVIDENCE, 8, 9.
Evidence of declarations of person since deceased, see EVIDENCE, 3, 4.
Admissibility of evidence explaining absence of witness, see EVIDENCE, 2.
Competency of experts as to guarding shingle saw, see MASTER AND SERVANT, 37.
Newly discovered impeaching testimony as ground for new trial, see NEW TRIAL, 7.

1. WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEASED. A widow, the defendant in an action to quiet title, cannot testify to statements made by her deceased husband as to his interest in the property in dispute; since she is a party in interest and to the record, within Rem. & Bal. Code, § 1211, prohibiting such a party from testifying to transactions with the deceased. *Dempsey v. Dempsey* 632

2. WITNESSES—EXPLANATION OF TESTIMONY. Upon a second trial of a case, it is not objectionable to allow a witness to explain one of his answers at the former trial by stating how he understood the question. *Haggard v. Seattle* 499

3. WITNESSES—CROSS-EXAMINATION. It is not proper cross-examination to question the plaintiff as to his knowledge of a matter constituting defendant's affirmative defense. *Silver v. London Assurance Corporation* 593

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.
Right of employment as property, see PROPERTY.

WRITS:

See CERTIORARI; INJUNCTION; MANDAMUS.

YEAR:

Agreements not to be performed within one year, see FRAUDS, STATUTE OF, 2.

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